TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902. 1903.

No. 208. 209.

HY-YU-TSE-MIL-KIN, APPELLANT,

vs.

PHILOMME SMITH.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

FILED FEBRUARY 5, 1903.

(13,224.)

19523

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 596.

HY-YU-TSE-MIL-KIN, APPELLANT,

vs.

PHILOMME SMITH.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

INDEX.

	Original.	Print.
Transcript from the circuit court of the United States for the district of Oregon	1	1
Order extending time to docket cause	1	1
Citation	2	2
Bill of complaint	3	3
Marshal's return of process	12	12
Subpœna	12	12
Demurrer	14	14
Order setting demurrer for hearing	15	15
Order overruling demurrer	16	16
Answer	17	17
Replication	23	23
Order appointing Charles H. Carter special examiner	25	25
Order appointing J. A. Sladen special examiner	26	26
Order referring cause back to Charles H. Carter, special examiner	27	27
Order appointing James W. Marshall commissioner	28	28
Stipulation to take deposition of G. W. Harper	29	29
Report of Special Examiner Carter	31	31
Supplemental report of Special Examiner Carter	43	43
Exceptions to findings of special examiner	45	45
Decree	48	48
Opinion	50	50
Cost bill	54	54
Certificate of special examiner	56	56

18139—03——0

	Original.	Print.
~~Order extending time to docket cause. Continued.~~		
Testimony accompanying findings of special examiners	57	57
Testimony of W. A. Smith	58	58
Mrs. W. A. Smith	81	81
Edward Brisbo	89	89
Charles Cholion	93	93
Albert Minthorn	99	99
Hy-Yu-Tse-Mil-Kin	102	102
Charles Wilkins	106	106
Philomme Smith (recalled)	108	108
Plaintiff's Exhibit A—Certified copy of letter of Secretary of the Interior to Commissioner General Land Office, September 24, 1896, and opinion of Assistant Attorney-General Little, August 6, 1896	110	110
Defendant's Exhibit No. 1—Certified copy of part of United States Indian Agent Harper's report, August 17, 1894, and schedule of allotments, etc	120	120
Testimony accompanying supplemental findings	123	123
Testimony of Susanne Gagnon	124	124
Philomme Smith	126	126
F. A. Smith	126	126
Ed Brisbo	128	128
Certificate of special examiner	130	130
Commission to take deposition of G. W. Harper	131	131
Interrogatories to G. W. Harper	133	133
Cross-interrogatories to G. W. Harper	134	134
Deposition of G. W. Harper	135	135
Commissioner's certificate	138	138
Deposition of J. B. Eddy	139	139
Commissioner's certificate	143	143
Order appointing J. A. Sladen, special examiner	145	145
Petition for appeal	147	147
Assignment of errors	148	148
Order allowing appeal	151	151
Order extending time to file transcript	152	152
Clerk's certificate to transcript	153	153
Order of submission	153½	155
Opinion	154	155
Decree	161	158
Petition for appeal	162	159
Allowance of appeal	162	159
Assignment of errors	163	159
Clerk's certificate	165	160
Citation	166	160
Acceptance of service of citation	167	161

In the Circuit Court of the United States for the District of Oregon.

PHILOMME SMITH, Plaintiff,

vs.

HY-YU-TSE-MIL-KIN, Defendant.

No. 2,595. October 12 1901.

Order Extending Time to Docket Cause.

Now, at this day, for good cause shown, it is ordered that the time within which the defendant is required to file the transcript of record in this cause, in the office of the clerk of the United States Circuit Court of Appeals for the Ninth Circuit, be, and the same is hereby extended thirty days.

WM. B. GILBERT,
Circuit Judge.

[Endorsed]: No. 766. United States Circuit Court of Appeals for the Ninth Circuit. Philomme Smith vs. Hy-yu-tse-mil-kin. Order Extending Time to Docket. Filed Oct. 11, 1901. F. D. Monckton, Clerk.

In the Circuit Court of the United States for the District of Oregon.

HY-YU-TSE-MIL-KIN,
Appellant,
vs.
PHILOMME SMITH,
Appellee.

Citation.

The United States of America, } ss.
Ninth Judicial Circuit.

To Philomme Smith, Greeting:

Whereas, Hy-yu-tse-mil-kin has lately appealed to the United States Circuit Court of Appeals for the Ninth Circuit from a decree rendered in the Circuit Court of the United States for the District of Oregon in your favor, and has given the security required by law. You are therefore hereby cited and admonished to be and appear before said Circuit Court of Appeals at San Francisco, California, within thirty days from the date hereof, to show cause, if any there be, why the said decree should not be corrected and speedy justice should not be done to the parties in that behalf.

Given under my hand at Portland, Oregon, in said District, this 12th day of September, A. D. 1901.

CHARLES B. BELLINGER,
Judge.

Due service of the above citation is hereby accepted at Pendleton, Oregon, this 13th day of September, 1901.

R. J. SLATER,
Attorney of Philomme Smith.

[Endorsed]: In the Circuit Court of the United States for the District of Oregon. Hy-yu-tse-mil-kin, Appellant, vs. Philomme Smith, Appellee. Citation. United States Circuit Court. Filed September 16, 1901. J. A. Sladen, Clerk. District of Oregon.

In the Circuit Court of the United States for the District of Oregon.

October Term, 1899.

Be it remembered, that on the 13th day of November, 1899, there was duly filed in the Circuit Court of the United States for the District of Oregon, a bill of complaint, in words and figures as follows, to wit:

In the Circuit Court of the United States for the District of Oregon.

IN EQUITY.

PHILOMME SMITH, Plaintiff,

vs.

HY-YU-TSE-MIL-KIN, Defendant.

Bill of Complaint.

To the Honorable, the Judges of the Circuit Court of the United States, for the District of Oregon:

Philomme Smith, of Adams, Umatilla county, State of Oregon, a full-blood Indian woman, a member of the Walla Walla band of Indians, and residing upon the Umatilla Indian Reservation, in said county and State, brings

this her bill of complaint against Hy-yu-tse-mil-kin, a full-blood Indian, residing upon said reservation, and therefore your orator complains and alleges:

I.

That on the 9th day of June, 1855, a treaty between the United States, on the one hand, and the Walla Walla, Cayuse and Umatilla Indian tribes and Indian bands in Washington and Oregon Territories, on the other, was concluded at Camp Stevens, in Walla Walla Valley, in Washington Territory, and duly signed by the representatives of said parties, and that said treaty was ratified by the United States Senate, on the 8th day of March, 1859, and proclaimed by the President of the United States on April 11th, 1859, wherein and whereby the said tribes of Indians, through their duly accredited representatives, ceded to the United States all their right, title, and claim to a large tract of country, situated in the territories of Oregon and Washington, and after a description of the said lands, so ceded, provided as follows: "That so much of the country described above as is contained in the following boundaries shall be set apart as a residence for said Indians, which tract, for the purpose contemplated, shall be held and regarded as an Indian reservation, to wit: Commencing in the middle of the channel of the Umatilla River, opposite the mouth of the Wild Horse Creek; thence up the middle of the channel of said creek to its source; thence southerly to a point in the Blue Mountains, known as Lee's Encampment; thence in a line to the head waters of Howtome Creek; thence west to the divide between Howtome and Birch Creeks; thence north-

erly along said divide to a point due west of the southwest corner of William C. McKay's land claim; thence east along his line to his southwest corner; thence to the place of beginning, all of which tract shall be set apart and, so far as necessary, surveyed and marked out for their exclusive use; nor shall any white person be permitted to reside upon the same without permission of the agent and superintendent. The said tribes and bands agree to remove to and settle upon the same within one year after the ratification of this treaty, without any additional expense to the Government, other than is provided by this treaty, and until the expiration of the time specified that said bands shall be permitted to occupy and reside upon the tracts now possessed by them, guaranteeing to all citizens of the United States, the right to enter upon and occupy as settlers any lands not actually enclosed by said Indians."

II.

That said land, described above, is known and designated as the Umatilla Reservation, in Umatilla County, State of Oregon.

III.

That said treaty provided, in article 6, as follows:

"The President may from time to time, at his discretion, cause the whole, or such portion as he may think proper, of the tract that may now or hereafter be set apart as a permanent home for the Indians to be surveyed into lots and assigned to such Indians of the confederated bands as may wish to enjoy the privileges, and locate thereon permanently. To a single person over twenty-one

years of age, forty acres; to a family of two persons, sixty acres; to a family of three and not exceeding five, eighty acres; to a family of six persons, and not exceeding ten, one hundred and twenty acres; and to each family, over ten in number, twenty acres to each additional three members; and the President may provide for such rules and regulations as will secure to the family, in case of the death of the head thereof, the possession and enjoyment of such permanent home and improvement thereon; and he may at any time at his discretion, after such person or family has made location on the land assigned, as permanent home, issue a patent to such person or family as such assigned land, conditioned that the tract shall not be aliened or leased for a longer term of two years, and shall continue in force until a State constitution embracing such lands within its limits shall have been formed, and the legislature of the State shall remove the restriction; provided, however, that no State legislation shall remove the restriction herein provided for without the consent of Congress."

IV.

That on the 3d day of March, 1885, the Congress of the United States passed an act entitled "An act providing for the allotment of lands in severalty to the Indians residing upon the Umatilla Reservation in the State of Oregon, and granting patents therefor, and for other purposes," which said act was approved by the President of the United States March 3d, 1885, which said act provided that the President of the United States should cause lands to be allotted to the confederated bands of

Cayuse, Walla Walla and Umatilla Indians residing upon the Umatilla Reservation, in the State of Oregon, as follows:

"Of agricultural lands to each head of the family, one hundred and sixty acres, to each single person over the age of eighteen years, eighty acres, to each orphan child under eighteen years of age, eighty acres, and to each child under eighteen years of age, not otherwise provided for, forty acres, and that all allotments to heads of families and to children under eighteen years of age belonging to families shall be made upon selections made by the head of the family, and allotments to persons over eighteen years of age not classed as heads of families should be made upon the selection of such persons." Said act further provided for the appointment of three disinterested persons by the President, to go upon said reservation, and make said allotments in severalty, and to do all such acts as were further specified in said act to effectually carry out the purposes thereof.

V.

That in pursuance to said authority the President of the United States did appoint commissioners, who thereafter carried out the purposes of said act, and made allotments of land as therein provided, to the members of said confederated tribes of Indians of the bands upon said Umatilla Reservation, which said work was completed and said allotments made on or about the 1st day of April, 1891.

VI.

That at the time said allotments were made as aforesaid your orator, Philomme Smith, was the head of a

family, a full-blood Indian woman, a member of the Walla Walla band of Indians, and as such was located and residing with her family upon said reservation, and upon that particular tract of land hereinafter described.

VII.

That prior to the said allotment your orator, Philomme Smith, being a member of said Walla Walla band of Indians, and assuch located and residing upon said Umatilla Reservation, by and with the consent of the head men of said tribe, settled upon, took possession of, inclosed and made extensive improvements upon the following described tract of land, to wit: The southeast quarter of section twenty, township three north, range thirty-four east, of the Willamette meridian (S. E. ¼ S. 20, T. 3 N., R. 34 E., W. M.), containing one hundred and sixty acres of land, more or less, said land being situate upon and a part of said Umatilla Reservation, and at the time of said allotments your orator, Philomme Smith, was residing upon and had actual possession of said tract of land.

VIII.

That on or about the 1st day of April, 1891, the President, under the provisions of the said act of Congress, approved March 3d, 1885, appointed James P. Bushee and James B. Eddy special allotting agents to allot lands in severalty to the said Indians residing on the said Umatilla Reservation, and the said agents immediately thereafter went upon said reservation and entered upon the discharge of their duties as such allotting agents, at which time your orator, Philomme Smith, was in the actual possession of said tract of land as aforesaid, and while said

agents were upon said reservation allotting said lands your orator went to said agents and then and there selected said tract of land as her allotment, but said agents refused to allot said land to your orator, and wrongfully allotted the same to the defendant Hy-yu-tse-mil-kin.

IX.

That thereafter, to wit, on or about October ——, 1896, the said Hy-yu-tse-mil-kin wrongfully took possession of said tract of land and of all the improvements thereon, and wrongfully ousted your orator therefrom, and ever since said time has been, and now is, in the exclusive possession of said land, to the great damage of your orator in the sum of $2,500.

X.

That at the time said allotment was made by said allotting agents the said Hy-yu-tse-mil-kin had no improvements upon said land, and did not have possession of any part of the same, and your orator selected said land and notified said allotting agents of her said selection prior to the selection of said defendant; and the said allotting agents at the time they allotted said land to the defendant had actual knowledge and notice of all the facts herein stated, and at the time the defendant selected said land as his allotment and applied to said agents for the same defendant had actual knowledge and notice of all the facts herein stated, and of all the rights of your orator.

XI.

That at the time your orator settled upon said lands and selected the same as her allotment under said act of

Congress and inclosed and improved the same all of said acts were done and performed with the knowledge, consent, and approval of the then agent of the United States upon said Umatilla Reservation, and the said agent assigned and set apart said tract of land for your orator.

XII.

That no patent has been issued to the defendant for said land.

To the end, therefore, that your orator may have that relief she can only obtain in a court of equity, and that the said defendant may answer the premises, but not upon oath of affirmaton, the benefit whereof is expressly waived by your orator, she now prays the Court for a decree declaring your orator to be the allottee upon the said tract of land, and that the allotment thereof to the defendant be canceled and annulled, and that the defendant, his servants and all persons holding under him as tenants, lessees, or otherwise, be forever enjoined from interfering with your orator's possession thereof, and that your orator have judgment against the defendant for damages in the sum of twenty-five hundred dollars ($2500), and the costs and disbursements of this suit, and that your orator may have such further or other relief in the premises as the nature of the circumstances of the case may require; and may it please your Honor to grant to your orator a writ of subpoena, to be directed to the said Hy-yu-tse-mil-kin, thereby commanding him at a certain time and under a certain penalty therein to be limited personally to appear before this Honorable Court, and then and there full, true, direct, and perfect answer

make to all and singular the premises, and to stand, perform, and abide by such order, direction, and decree as may be made against him in the premises, as shall seem meet and agreeable to equity.

And your orator will ever pray.

R. J. SLATER,
Attorney for Orator.

State of Oregon, }
Umatilla County. } ss.

I, Philomme Smith, being first duly sworn, say I am the orator in the above-entitled suit, and the facts stated in the above bill of complaint are true, as I verily believe.

Her
PHILOMME X SMITH.
mark.

R. J. SLATER,
Witness to Mark.

Subscribed and sworn to before me this 11th day of November, 1899.

[Seal] J. T. HINKLE,
Notary Public for Oregon.

Filed November 13, 1899. J. A. Sladen, Clerk United States Circuit Court, District of Oregon.

And afterwards, to wit, on the 13th day of November, 1899, there was issued out of said court a subpoena ad respondendum, in words and figures as follows, to wit:

Return of Civil Process.

United States of America,
District of Oregon. } ss.

I hereby certify that on the 2d day of December, 1899, at Pendleton, Umatilla County, in said District, I duly served the within subpoena ad respondendum upon the therein named Hy-yu-tse-mil-kin, and by delivering to him personally a true copy of said subpoena ad respondendum, duly certified to by me as United States marshal.

ZOETH HOUSER,
United States Marshal.
By S. L. Morse,
Deputy.

In the Circuit Court of the United States, for the District of Oregon.

IN EQUITY.

PHILOMME SMITH, Complainant.
vs.
HY-YU-TSE-MIL-KIN, Defendant.
No. 2.595.

Subpoena ad Respondendum.

The President of the United States of America, to Hy-yu-tse-mil-kin, Greeting:

You and each of you are hereby commanded that you be and appear in said Circuit Court of the United States,

at the courtroom thereof, in the city of Portland, in said District, on the first Monday of December next, which will be the 4th day of December, A. D. 1899, to answer the exigency of a bill of complaint exhibited and filed against you in our said court, wherein Phlomme Smith is complainant, and you are defendant, and further to do and receive what our said Circuit Court shall consider in this behalf, and this you are in nowise to omit under the pains and penalties of what may befall thereon.

And this is to command you the marshal of said District, or your deputy, to make due service of this our writ of subpoena and to have then and there the same.

Hereof fail not.

Witness the Honorable MELVILLE W. FULLER, Chief Justice of the United States, this 13th day of November, in the year of our Lord one thousand eight hundred and ninety-nine, and of the Independence of the United States the one hundred and twenty-fourth.

[Seal of the U S. Circuit Court, District of Oregon.]

J. A. SLADEN,
Clerk.

Memorandum pursuant to Equity Rule No. 12 of the Supreme Court of the United States.

The defendant is to enter his appearance in the above-entitled suit in the office of the clerk of said court on or before the day at which the above writ is returnable; otherwise the complainant's bill therein may be taken pro confesso.

Returned and filed. December 6, 1899. J. A. Sladen, Clerk United States Circuit Court, District of Oregon.

And afterwards, to wit, on the 30th day of December, 1899, there was duly filed in said court a demurrer to bill, in words and figures as follows, to wit:

In the Circuit Court of the United States, for the District of Oregon.

IN EQUITY.

PHILOMME SMITH,
vs.
HY-YU-TSE-MIL-KIN.

Demurrer.

The demurrer of the above-named defendant Hy-yu-tse-mil-kin to the bill of complaint of the above-named plaintiff.

This defendant, by protestation, not confessing or acknowledging all or any of the matters or things in the said bill of complaint contained to be true, in such manner and form as the same herein set forth and alleged, doth demur to the said bill, and for cause of demurrer showeth:

1st. That it appeareth by plaintiff's own showing by the said bill that she is not entitled to the relief prayed by the bill against this defendant, or any relief, and that it appeareth by plaintiff's own showing by the said bill that your Honorable Court hath no jurisdiction over the subject matter of the said suit.

Wherefore, and for divers other good causes of demurrer appearing on the said bill, this defendant doth demur thereto. And he prays the judgment of this Honorable Court, whether he shall be compelled to make

any answer to the said bill; and he humbly prays to be hence dismissed with his reasonable costs in this behalf sustained.

JOHN H. HALL,
United States Attorney, Solicitor and Counsel for Defendant.

I hereby certify that the foregoing demurrer is, in my opinion, well founded in point of law.

JOHN H. HALL,
United States Attorney.

Filed December 30, 1899. J. A. Sladen, Clerk United States Circuit Court, District of Oregon.

And afterwards, to wit, on Tuesday, the 6th day of March, 1900, the same being the 132d judicial day of the regular October term of said Court—Present, the Honorable CHARLES B. BELLINGER, United States District Judge presiding—the following proceedings were had in said cause, to wit:

In the Circuit Court of the United States, for the District of Oregon.

PHILOMME SMITH, vs. HY-YU-TSE-MIL-KIN. } No. 2,595. March 6, 1900.

Order Setting Demurrer for Hearing.

Now, at this day, on motion of Mr. Edwin Mays, Assistant United States Attorney, it is ordered that the hearing of this cause upon the demurrer to the complaint herein be, and it is hereby, set for Monday, March 19, 1900.

And afterwards, to wit, on Monday, the 19th day of March, 1900, the same being the 143d judicial day of the regular October term of said Court—Present, the Honorable CHARLES B. BELLINGER, United States District Judge presiding—the following proceedings were had in said cause, to wit:

In the Circuit Court of the United States, for the District of Oregon.

PHILOMME SMITH,
vs.
HY-YU-TSE-MIL-KIN.

No. 2,595.
March 19, 1900.

Order Overruling Demurrer.

Now, at this day, comes the plaintiff herein by Mr. R. J. Slater, of counsel, and the defendant by Mr. John H. Hall, United States Attorney, and thereupon this cause comes on to be heard upon the demurrer to the bill of complaint herein, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged that said demurrer be, and the same is hereby, overruled.

And afterwards, to wit, on the 2d day of April, 1900, there was duly filed in said court an answer to bill of complaint, in words and figures as follows, to wit:

In the Circuit Court of the United States, for the District of Oregon.

IN EQUITY.

PHILOMME SMITH,
Plaintiff,

vs.

HY-YU-TSE-MIL-KIN,
Defendant.

Answer.

To the Honorable, the Judge of the Circuit Court of the United States for the District of Oregon:

Comes now the defendant above named, and for answer to plaintiff's bill of complaint filed herein alleges:

That defendant had no knowledge or information sufficient to form a belief as to whether or not Philomme Smith, the plaintiff herein, is a full-blooded Indian woman, or a member of the Walla Walla band of Indians, and therefore denies the same.

Admits the execution of the treaty between the United States on the one hand, and the Walla Walla Cayuse and Umatilla Indian tribes on the other, as pleaded in paragraph 1 of plaintiff's complaint.

Admits that the land described in said paragraph 1 is known and designated as the Umatilla Indian Reservation, and situated in Umatilla County, State of Oregon.

Admits the said treaty in section 6, article 6 thereof, as set forth in paragraph 3 of plaintiff's complaint.

Admits the provision of the act of March 3d, 1885, of

the Congress of the United States, as set out in paragraph 4.

Admits appointment by the President of the United States of commissioners for the allotment of land upon said Indian Reservation, to said tribes of Indians, and that said work was completed and allotments made on or about the first day of April, 1891.

Denies that at the time said allotments were made, or at any other time, or at all, Philomme Smith was the head of a family.

Denies, upon information and belief, that she was a full-blooded Indian woman, or a member of the Walla Walla band of Indians, or as such, or at all, was located or residing with her family upon said reservation, or upon any particular tract of land thereon.

Denies, upon information and belief, prior to the said allotment that said Philomme Smith was a member of said Walla Walla band of Indians, or as such, or at all, was located or residing upon said Umatilla Reservation, either with or without the consent of the head men of said tribe.

Denies that plaintiff ever took possession of or enclosed or made extensive or any improvements upon the southeast quarter of section 20, township 3 north of range 34, east of the Willamette meridian, except as hereinafter stated.

Admits that said land was a part of said Umatilla Reservation, but denies that at the time of said allotment, or any other time, said Philomme Smith was residing upon or had actual or any possession of said tract of land, or any portion thereof, except as hereinafter stated.

Admits that on or about the 1st day of April, 1891, the President of the United States, under the provisions of said act of Congress approved March 3, 1885, appointed James P. Bushee and James B. Eddy special allotting agents to allot lands in severalty to the said Indians residing on the said Umatilla Indian Reservation, and that said agents immediately thereafter went upon said reservation and entered upon the discharge of their duties as such; but,

Denies that at said time, or any other time, plaintiff was in actual or any possession of said tract of land or any portion thereof, and as to whether or not, while said agents were upon said reservation allotting said lands, or at any other time, or at all, plaintiff went to said agents, and then and there selected said lands for her allotment, as to whether or not said agents, or either of them, refused to allot said lands to plaintiff, this defendant has no knowledge or information to form belief, and therefore denies same.

Denies that said allotting agents wrongfully allotted said southeast quarter of said section 20, township and range as aforesaid, to this defendant.

Denies that on or about the —— day of October, 1896, or at any other time, the defendant wrongfully took possession of said tract of land and improvements thereon, or wrongfully ousted plaintiff therefrom, but avers that defendant, on or about said day, rightfully took possession of said tract of land and such improvements there were thereon, and ever since said time has been, and now is, in exclusive possession of said land; but denies that

plaintiff is damaged thereby in the sum of $2,500, or any other sum whatever.

Admits that at the time said allotment was made by said agents defendant had no improvements upon said land, and did not have possession thereof, but denies upon information and belief that plaintiff selected said land, and notified said allotting agents of her selection prior to the selection by this defendant, or that the said allotting agents, or either of them, at the time they allotted said land to defendant had actual notice or knowledge of all or any of the facts set forth in plaintiff's complaint at the time defendant selected said land as his allotment, but applied to said agents for the same.

Denies that defendant had actual or any knowledge of all or any of the facts stated in plaintiff's complaint, or of all or any of the alleged rights of plaintiff.

Denies, upon information and belief, that at the time plaintiff alleges she settled upon said land and selected the same as her allotment, and enclosed and improved same, all or any of the said alleged facts were done or performed with the knowledge or consent of the then agents of the United States upon the said Umatilla Reservation, or that said agents assigned or set apart said land for plaintiff.

Admits that defendant has not yet received a patent from the Government of the United States for said land, and defendant, for further and separate answer or defense to plaintiff's bill of complaint filed herein, alleges:

That during the year of 1891, and at the time that said allotments in severalty were being made by said allotting agents, that Philomme Smith, the plaintiff herein,

was then residing upon the northwest quarter of the northeast quarter of section 29, township 3 north, range 34 east, of the Willamette meridian, and being upon the Umatilla Reservation.

That plaintiff was not residing upon the southeast quarter of section 20, township and range aforesaid, and that plaintiff had no improvements thereon save and except a small log barn and a well.

That at the time of said allotment, by a ruling of the Secretary of the Interior, plaintiff was not entitled to an allotment upon said Indian Reservation; and that at said time defendant herein being a full-blooded Indian, and residing upon said reservation, duly made a selection of the said southeast quarter of said section 20, and the same was duly allotted to him by the allotting agents.

That thereafter defendant paid to the said Philomme Smith the sum of twenty dollars, through the then agent of the Umatilla Indian Reservation, which sum was then and there received by plaintiff in full compensation for all improvements she then had upon said southeast quarter of section 20.

That defendant peaceably and with the consent of plaintiff took possession of said tract of land, and ever since that time has been, and now is, in possession of the same.

And plaintiff further alleges that at the time said allotments were being made that the said Philomme Smith was not the head of a family, and that she was married to a white man of the name of ——— Smith, and that the same ——— Smith being the head of said family, and

not being an Indian, and not belonging to said tribe was not entitled to a selection of land for an allotment.

That thereafter, on or about the —— day of April, 1897; the Department of the Interior of the United States reversed its former ruling, and decided that the said Philomme Smith, the plaintiff herein, was entitled to an allotment of land upon said Umatilla Reservation, and in pursuance thereof directed Mr. George W. Harper, the then Indian agent in charge of said Umatilla Reservation, to make an allotment of land to the said Philomme Smith.

That in pursuance of said direction said Indian agent requested said Philomme Smith to make selection land to be allotted to her on said reservation.

That in pursuance thereof said Philomme Smith did make selection of lots 13 and 14 in section 36, township 3 north, range 33 east, containing seventy acres, and other lands which defendant is not able to describe.

That said lands were duly allotted to her by the said Indian agent in pursuance of his authority aforesaid, and that thereafter said Philomme Smith took possession of said lands so allotted to her, and has ever since said time exercised ownership over the same, and has rented out said lands, particularly the seventy acres hereinbefore described for the years 1898, 1899, 1900 and 1901, at an annual rental of one dollar and fifty cents per acre, which said rental said plaintiff collects and enjoys.

That said Philomme Smith has not surrendered or offered to surrender, cancel, or give up said allotment so made to her by said agent, but continues to hold, use, and occupy same.

Wherefore, defendant having fully answered each and every allegation in plaintiff's complaint, respectfully prays your Honors that he be dismissed hence with his costs and disbursements, and for such further equitable relief as to your Honors may seem meet and just.

HY-YU-TSE-MIL-KIN,
Defendant.

By JOHN H. HALL,
Appearing for him under the direction of the Attorney General of the United States.

Filed April 2, 1900. J. A. Sladen, Clerk United States Circuit Court, District of Oregon.

And afterwards, to wit, on the 13th day of April, 1900, there was duly filed in said court a replication, in words and figures as follows, to wit:

In the Circuit Court of the United States for the District of Oregon.

PHILOMME SMITH,
Plaintiff.

vs.

HY-YU-TSE-MIL-KIN,
Defendant.

Replication.

To the Honorable, the Judge of the Circuit Court of the United States for the District of Oregon.

Replication of complaint in above cause to the answer of Hy-yu-tse-mil-kin, defendant.

This replicant, saving and reserving all advantage of exception to the manifold insufficiencies of said answer, for replication thereto saith that she will aver and prove her said bill to be true and sufficient, and that the said answer is untrue and insufficient.

Wherefore she prays relief as in said bill set forth.

Her
PHILOMME X SMITH.
mark.

United States of America,
District of Oregon. } ss.

I, Philomme Smith, complainant in above cause, having read the foregoing replication to answer of defendant herein, and being first duly sworn, do say that the matters and things in said replication contained are true.

Her
PHILOMME X SMITH.
mark.

Subscribed and sworn to before me this 9th day of April, A. D. 1900.

[Seal] J. T. HINKLE,
Notary Public for Oregon.

Filed April 13, 1900. J. A. Sladen, Clerk United States Circuit Court, District of Oregon.

And afterwards, to wit, on Tuesday, the 1st day of May, 1900, the same being the 19th judicial day of the regular April term of said court—Present, the Honorable CHARLES B. BELLINGER, United States District Judge presiding—the following proceedings were had in said cause, to wit:

In the Circuit Court of the United States for the District of Oregon.

PHILOMME SMITH,
Plaintiff
vs.
HY-YU-TSE-MIL-KIN,
Defendant.

No. 2,595.
May 1, 1900.

Order Appointing Charles H. Carter Special Examiner.

Now at this day, on motion of Mr. John H. Hall, United States Attorney, of counsel for the defendant herein, it is ordered that Charles H. Carter, of Pendleton, in the county of Umatilla, and in the State and District of Oregon, be, and he is hereby, appointed a special examiner of this court for the purpose of taking such testimony in this cause as shall be produced before him by the parties to this suit, said testimony to be taken at such times and at such places as said special examiner may decide, due notice thereof being first given to the parties hereto or to their counsel; and

It is further ordered that said testimony be reduced to writing, and that upon its conclusion said special examiner shall send the same, together with his findings of fact thereon, to the clerk of this court.

CHARLES B. BELLINGER,
Judge.

Filed May 1, 1900. J. A. Sladen, Clerk United States Circuit Court, District of Oregon.

And afterwards, to wit, on Monday, the 12th day of November, 1900, the same being the 37th judicial day of the regular October term of said court—Present, the Honorable CHARLES B. BELLINGER, United States District Judge presiding—the following proceedings were had in said cause, to wit:

In the Circuit Court of the United States for the District of Oregon.

PHILOMME SMITH,
Plaintiff,
vs.
HY-YU-TSE-MIL-KIN,
Defendant.

No. 2,595.
November 12, 1900

Order Appointing J. A. Sladen Special Examiner.

Now, at this day, comes the plaintiff, by Mr. John H. Hall, United States Attorney, and moves the Court for an order appointing a special examiner to take the testimony in this cause at Portland, Oregon. On consideration whereof, it is ordered that J. A. Sladen, clerk of the United States Circuit Court for the District of Oregon, be, and he is hereby, appointed a special examiner of this court, to take and reduce to writing and transmit to the Court the testimony of J. B. Eddy, a witness on the part of the defendant in this cause, said testimony to be taken at such time and place in the city of Portland, in this State and District, as said special examiner shall appoint,

due notice thereof having been given to the parties hereto.

CHARLES B. BELLINGER,
Judge.

Filed November 12, 1900. J. A. Sladen, Clerk United States Circuit Court, District of Oregon.

In the Circuit Court of the United States for the District of Oregon.

PHILOMME SMITH,
Plaintiff,
vs.
HY-YU-TSE-MIL-KIN,
Defendant.
No. 2,595.
November 12, 1900

Order Referring Cause Back to Charles H. Carter, Special Examiner.

Now, at this day, on motion of Mr. John H. Hall, United States Attorney, of counsel for the defendant herein, it is ordered that this cause be, and the same is hereby, referred back to Mr. Charles H. Carter, heretofore appointed a special examiner in this cause at Pendleton, Oregon, for the purpose of taking such further testimony in this cause as shall be produced before him by the parties to this suit, said testimony to be taken at such times and places as said special examiner may decide, due notice thereof being first given to the parties hereto; and

It is further ordered that said testimony be reduced to

writing, and upon its conclusion said special examiner shall send the same to the clerk of this Court.

CHARLES B. BELLINGER,
Judge.

Filed November 12, 1900. J. A. Sladen, Clerk United States Circuit Court, District of Oregon.

In the Circuit Court of the United States for the District of Oregon.

PHILOMME SMITH
vs.
HY-YU-TSE-MIL-KIN.

No. 2,595.
November 12, 1900.

Order Appointing Commissioner to Take Depositions.

Now, at this day, comes the defendant, by Mr. John H. Hall, United States Attorney, and said defendant moves the Court for an order that a dedimus potestatem issue out of this court, directed to some qualified person at Spokane, in the State of Washington, authorizing and empowering him, as a Commissioner of this court, to take and transmit to this Court the testimony of G. W. Harper, a witness on the part of said defendant, to be used on the trial of this cause, and it appearing necessary, to prevent a failure of justice, that the testimony of said witnesses should be taken on commission issued out of this court:

It is ordered that the clerk of this court issue a commission to James W. Marshall, residing at Spokane, aforesaid, authorizing and empowering him as a Commissioner of this court to take and transmit to this Court the testi-

mony of the above-named witness, in answer to interrogatories, direct and cross, to be prepared by the parties, and submitted to the clerk in case they cannot agree thereto.

CHARLES B. BELLINGER,
Judge.

Filed November 12, 1900. J. A. Sladen, Clerk United States Circuit Court, District of Oregon.

And afterwards, to wit, on the 20th day of November, 1900, there was duly filed in said court a stipulation for commission to J. W. Marshall, to take depositions in words and figures as follows, to wit:

In the Circuit Court of the United States for the District of Oregon.

PHILOMME SMITH, Plaintiff,

vs.

HY-YU-TSE-MIL-KIN, Defendant.

Stipulation to Take Deposition of G. W. Harper.

It is hereby stipulated, by and between the parties hereto, that the deposition of G. W. Harper, a witness for plaintiff, residing at Spokane, State of Washington, may be taken by interrogatories hereto attached and made a part of this stipulation, said deposition to be taken by Jas. W. Marshall a deputy United States clerk for the State of Washington, residing at Spokane in said State,

at his office at Spokane, in said State of Washington, on the 23d day of November, 1900, at the hour of two o'clock P. M.; or if for any reason the said James W. Marshall cannot take said deposition, then the same may be taken by any other notary public for the State of Washington at the same time and place.

That before testifying the said G. W. Harper shall be sworn by the officer taking the same, to tell the truth, the whole truth, and nothing but the truth; and the said officer shall cause the interrogatories and cross-interrogatories hereto attached, and the answers thereto, to be typewritten and then signed by the said G. W. Harper; and when the evidence is thus reduced to typewriting, the said officer shall certify that the same was taken as herein provided, and all other forms and requirements are hereby waived.

And the officer taking the same shall seal the depositions thus taken by him, and mail them to C. H. Carter, at Pendleton, Oregon, and the same shall be used by either party as evidence in this cause.

R. J. SLATER,
Attorney for Plaintiff.
JOHN H. HALL,
Attorney for Defendant.

Filed November 20, 1900. J. A. Sladen, Clerk.

And afterwards, to wit, on the 10th day of September, 1900, there was duly filed in said court the findings of Charles H. Carter, Special Examiner, in words and figures as follows, to wit:

In the Circuit Court of the United States for the District of Oregon.

IN EQUITY.

PHILOMME SMITH,

Plaintiff,

vs.

HY-YU-TSE-MIL-KIN,

Defendant.

Report of Special Examiner Carter.

To the Honorable CHARLES B. BELLINGER, Judge of the Circuit Court of the United States for the District of Oregon:

The undersigned, Chas. H. Carter, of Pendleton, Oregon, who was on May 1st, 1900, duly appointed by your Honor special examiner in the above-entitled cause, to take testimony therein and return the same, together with his findings of fact thereon, to the said Court, respectfully reports:

That by agreement between both parties to the above-entitled suit, by their attorneys and solicitors, he, as special examiner, fixed the time for the taking of testimony herein at 10 o'clock in the forenoon on July 31, 1900, at the courthouse of Umatilla county, Oregon, in Pendleton, in said county, at which time and place he attended, and the plaintiff also attended in person, and by Robert J. Slater, her attorney and solicitor, and defendant also attended in person and by Mr. John H. Hall, United States District Attorney, his solicitor and attor-

ney; and at that time and place the testimony of the following witnesses on behalf of plaintiff was taken, to wit: W. A. Smith, Philomme Smith (the plaintiff), and Edward Brisbo, and the testimony of the following witnesses on behalf of the defendant was taken, to wit: Louis Chalifoe, Albert Minthorn, the defendant Hy-yu-tse-mil-kin, and Charles Wilkins, the Indian agent, and the services of Joseph Craig, an Indian as interpreter, were required by the defendant; the testimony of the said witnesses, together with all exhibits introduced by the parties to this suit, is herewith returned to the clerk of the above-entitled Circuit Court, said testimony having been taken by Mr. J. S. Beckwith, as stenographer, who was employed by mutual agreement between the parties hereto for the occasion and for that purpose, and the testimony of the said witnesses was taken down by the said stenographer in shorthand, and afterwards by him reduced to typewriting; the signing of their testimony by the witnesses, respectively, was by the said parties through their attorneys aforesaid, before me in open court, expressly waived in this cause.

The said special examiner reports to the Court the following as his findings of facts in this cause:

I.

That plaintiff, Philomme Smith, is a full-blooded Indian woman, and at all the times in the complaint mentioned was, and is now, a member of the Walla Walla band or tribe of Indians, and resides upon the Umatilla Indian Reservation, in the State of Oregon.

II.

The defendant, Hy-yu-tse-mil-kin, is a full-blooded Indian, residing upon said Umatilla Indian Reservation, in the State of Oregon.

III.

That a treaty was executed between the United States, on the one hand, and the Walla Walla, Cayuse and Umatilla Indian tribes and Indian bands, on the other, as stated in paragraph I of plaintiff's complaint.

IV.

The land described in said paragraph I of plaintiff's complaint is situated on the Umatilla Indian Reservation, in Umatilla County, State of Oregon.

V.

That in article 6 of the said treaty it was provided as follows:

"The President may from time to time, at his discretion, cause the whole, or such portion as he may think proper, of the tract that may now, or hereafter, be set apart as a permanent home for the Indians, to be surveyed into lots and assigned to such Indians of the confederated bands, as may wish to enjoy the privileges, and locate thereon permanently: To a single person over twenty-one years of age, forty acres; to a family of two persons, sixty acres; to a family of three and not exceeding five, eighty acres; to a family of six persons, and not exceeding ten, one hundred and twenty acres; and to each family, over ten in number, twenty acres to each additional three members;

and the President may provide for such rules and regulations as will secure to the family, in case of the death of the head thereof, the possession and enjoyment of such permanent home and improvement thereon; and he may at any time at his discretion, after such person or family has made location on the land assigned, as a permanent home, issue a patent to such person or family as such assigned land, conditioned that the tract shall not be aliened or leased for a longer term than two years, and shall continue in force until a State constitution embracing such lands within its limits shall have been formed, and the legislature of the State shall remove the restriction; provided, however, that no State legislation shall remove the restriction herein provided for without the consent of Congress."

VI.

On March 3, 1885, the Congress of the United States passed an act, entitled "An act providing for the allotment of lands in severalty to the Indians residing upon the Umatilla Indian Reservation, in the State of Oregon, and granting patents therefor, and for other purposes," which was approved by the President of the United States on March 3, 1885, which act provides that said President should cause lands to be allotted to the confederated bands of Cayuse, Walla Walla and Umatilla Indians residing on the Umatilla Indian Reservation aforesaid, and which contains the provision set forth in paragraph IV of plaintiff's complaint in this cause.

VII.

In pursuance of the authority granted by that act, the President of the United States appointed commissioners

for the allotment of lands on said Umatilla Indian Reservation to those entitled to it, which commissioners thereafter carried out the purposes of said act, and made allotments of lands as provided therein to the members of said confederated tribes of Indians of the bands of Indians upon said Umatilla Indian Reservation, which work was completed and allotments made on or about April 1st, 1891.

VIII.

At the time the above mentioned allotment was made, plaintiff, Philomme Smith, was the wife of W. A. Smith, who was really the head of his family, which consisted of himself, his wife, and their eight children; said W. A. Smith is a white person, and has been plaintiff's husband since January 16, 1861, whilst plaintiff is an Indian woman belonging to the Walla Walla tribe of Indians from her birth; the Honorable Secretary of the Interior in Washington, and the Honorable Assistant Attorney General, seem to recognize plaintiff as the head of the family, in the sense mentioned in the above-named act of Congress of March 3, 1885, and as such she is entitled to allotment on the Umatilla Indian Reservation if she is otherwise competent to have such allotment (see Plaintiff's Exhibit "A" herewith); at the time the said allotments were made the said plaintiff, Philomme Smith, was located and residing with her family upon the Umatilla Indian Reservation above mentioned, upon a large tract of land, including the particular tract of land in controversy in this cause, to wit: The southeast quarter of section 20, in township 3 north and range 34 east of the Willamette meridian, containing one hundred and sixty acres of land.

and plaintiff, with her family, at that time were living about twenty steps from the boundary line of the particular one hundred and sixty acres last described inside of another field which was inclosed with said one hundred and sixty acres in one body by having a furrow plowed around the same, marking it off from the other adjacent lands; and she and her family were then in possession thereof.

IX.

That prior to the allotment of said lands by said commissioners on the Umatilla Indian Reservation, and after the allotting lists from which the allotments were made by said commissioners were made up, plaintiff, Philomme Smith, with the consent of Homily, then chief of the Walla Walla Indians, and Show-a-way, chief of the Cayuse Indians, with her family settled upon the tract of land as above stated, took possession of it and enclosed it in the manner above mentioned, to wit, by plowing certain furrows around it, thus dividing it by those furrows plowed from the adjacent lands on said reservation, which plowing was done in April, 1888, or immediately thereafter; at that time there were no improvements on the land; the whole body of land around which this furrow was plowed aggregated about five hundred and sixty acres, which plaintiff, through her husband, as her agent, in 1888, when she first moved upon said reservation, selected as lands for herself and her family; that thereafter and prior to the time when allotment was made the plaintiff, with the assistance of her husband, made valuable improvements upon and around said southeast quarter of section 20, township 3 north, range 34 east of the Wil-

lamette meridian, by building upon this particular one hundred and sixty acres of land in controversy in this suit a small cabin thereon for a granary, a barn, and by having a well dug on it, and later on and prior to said allotment by having another barn built on it; also a mile and a quarter of wire fence enclosing the whole tract; the total value of the improvements upon this particular one hundred and sixty acres in controversy, so built by plaintiff prior to allotment, was about $500.00 to $575.00 at that time; but up to the time when the allotments of lands were made by the commissioners as aforesaid plaintiff and her family had only used the particular one hundred and sixty acres in controversy for the purpose of pasturing stock thereon; the southeast quarter of section 20, township 3 north, range 34 east of the Willamette meridian, above mentioned, is a part of the Umatilla Reservation, in the State of Oregon, and plaintiff was residing in a house about twenty steps from the edge thereof from the time she moved upon said reservation, to wit, in the month of April, 1888, until long after the allotments were made by the commissioners aforesaid, to wit, until 1897; and plaintiff and her family had possession of said place, with the improvements made thereon as above stated, from some time during the year 1888 until about the year 1897 or the fall of the year 1896, she and her family living during that time in the house about twenty steps from the boundary line of said particular one hundred and sixty acres; plaintiff did not leave it or leave possession of it until about 1897, when plaintiff and her family did leave it because they were ordered to do so by the then Indian agent.

X.

About April 1st, 1891, under provisions of the aforesaid act of Congress approved March 3d, 1895, the President of the United States appointed James P. Bushee and James B. Eddy special allotting agents, to allot the land in severalty to the Indians of the Umatilla Reservation, and those gentlemen immediately thereafter went on that reservation and entered upon the discharge of their duties, and at that time plaintiff and her family resided in the house above mentioned, about twenty steps from the edge of the one hundred and sixty acres of land in controversy in this cause, and she and her family having possession thereof, having used the same up to that time only for the purpose of pasturing stock thereon, and having made the improvements thereon as aforesaid prior to and up to that time; and whilst the said Bushee and Eddy, special allotting agents, were upon the Umatilla Indian Reservation, allotting the lands thereof, plaintiff and her husband, who was acting as her agent and representative, went to the allotting agents and asked to have the particular tract of one hundred and sixty acres in controversy in this cause allotted to her, the plaintiff, and selected that tract as her allotment; but those agents refused to allot that land to plaintiff because her name was not upon their allotment lists at all; and the said allotting agents did then allot the said one hundred and sixty acres, to wit, the southeast quarter of section 20, in township 3 north, range 34 east of the Willamette meridian, to the defendant, Hy-yu-tse-mil-kin, who was and is an Indian, properly entitled to an allotment of one hundred and sixty acres of land upon said reservation.

XI.

The defendant, Hy-yu-tse-mil-kin, in the month of October, 1896, took possession of the said southeast quarter of section 20, in controversy here, and about that time plaintiff, by order of the Indian agent on that reservation, relinquished her possession of those lands.

XII.

When the allotment was made the defendant had no improvements whatever upon any part of the lands in controversy, and had no possession thereof; before those lands were allotted to defendant, and whilst the allotting agents were engaged in allotting the lands as above stated, plaintiff asked to be allotted upon the particular one hundred and sixty acres in controversy in this cause by those allotting agents, but they declined to do so, because her name was not upon their allotting list.

XIII.

At the time when the plaintiff and her family settled upon the tract of five hundred and sixty acres which enclose the tract in controversy in this cause, to wit, in 1888, and when the same was marked off by having a furrow plowed around it as aforesaid, these acts of plaintiff and her family were done with the knowledge and consent of ——— Coffee, who was at that time acting as Indian agent upon the Umatilla Reservation aforesaid.

XIV.

That no patent had ever been issued for said lands when this cause was commenced.

XV.

That in the year A. D. 1900, at the time that the allot-

ments in severalty of the lands were made by the allotting agents aforesaid, plaintiff did not reside upon the one hundred and sixty acres in controversy, but did reside upon the lands adjacent thereto, and about twenty steps distant therefrom, but plaintiff and her family held possession at that time, and for some time theretofore and thereafter, as shown in the above findings of facts; but plaintiff has never actually resided upon that particular quarter section of land; that defendant has never paid plaintiff any money at all, in any manner, for any improvements which she then or ever had upon any part of the lands in controversy in this suit; that defendant went into possession of the land when plaintiff moved out of the possession thereof, in the fall of 1896 or the early part of 1897, and plaintiff so left possession thereof by reason of the orders to her given by the then Indian agent, G. W. Harper; and since she so went out of possession of said lands she has never at any time been in possession of any part thereof.

XVI.

That when the allotment were made in 1891 as aforesaid of said lands plaintiff was married to the above named W. A. Smith, who is a white man, and has never belonged to any tribe of Indians, and is not entitled to any selection of land for any allotment upon the Umatilla Reservation; and during all the time while she has been on the reservation her said husband, W. A. Smith, has acted as agent for her; as to whether plaintiff is the head of the family, or the said W. A. Smith is the head of the family, the special examiner does not know; but

XVII.

In April, 1897, the Department of the Interior of the United States decided that plaintiff was entitled to an allotment of land upon the Umatilla Indian Reservation aforesaid; and directed G. W. Harper, the then Indian agent in charge of that reservation, to make an allotment to plaintiff, pursuant to that direction the said G. W. Harper, as Indian agent, called upon the plaintiff to make a selection of lands for her allotment, and plaintiff's husband, W. A. Smith, claiming to act for plaintiff, consented to accept as allotment for her lots 13 and 14, in section 36, in township 3 north and range 33 east of the Willamette meridian, and lot 3 of section 5, in township 2 north, and the southwest quarter of the northwest quarter of section 33, in township 3 north and range 34 east of the Willamette meridian, containing one hundred and forty-six and twenty hundredths acres in all, as her allotment, recognizing her in so doing as the head of a family, and a part of this land, to wit, so much thereof as is contained in section 36, in township 3 north, range 33 east of the Willamette meridian, she leased three or four years ago to a tenant, and since then she has, in the latter part of the year 1899 or the first part of the year 1900, again leased it to one Snyder, and plaintiff has accepted as the rental of said lands from said Snyder certain rents therefor, by the last lease which she made to the said Snyder he is to pay her a rental of three dollars per acre, and by the first lease the rental she received was two and one-half dollars per acre; that this lease only covers seventy acres; this selection of land was made for the plaintiff by

her husband, and plaintiff has actually received herself some of the rents therefor.

XVIII.

That plaintiff has not in any manner surrendered, or offered to surrender, or cancel, or give up any part of the allotments so made to her by the said agent, George W. Harper, but continues to receive the rents therefor.

XIX.

Plaintiff left the one hundred and sixty acres in controversy in this suit, and the possession thereof, and all the improvements thereon, because the Indian agent, George W. Harper, told her she had no right to stay there and that she had to leave; she asked of the allotting agents to have the land in question allotted to her, but they refused to do so because her name was not upon the allotting list; she herself selected for herself the one hundred and sixty acres of land in controversy in this suit, out of the whole tract of land which had been marked out by her husband; she never raised any crop on the land, nor rented it to anybody, and only used it for pasturing stock.

Respectfully submitted,

CHAS. H. CARTER,
Special Examiner.

Filed September 10, 1900. J. A. Sladen, Clerk United States Circuit Court, District of Oregon.

And afterwards, to wit, on the 1st day of March, 1901, there was duly filed in said court supplemental findings of Charles H. Carter, special examiner, in words and figures as follows, to wit:

In the Circuit Court of the United States for the District of Oregon.

PHILOMME SMITH, Plaintiff,

vs.

HY-YU-TSE-MIL-KIN, Defendant.

Supplemental Report of Special Commissioner.

To the Honorable CHARLES B. BELLINGER, Judge of the above-entitled Court.

This cause was referred back to the undersigned, Charles H. Carter, special examiner, by an order made by your Honor some time after September 10, 1900, by request of both parties, in order that each side might take some further testimony; accordingly, the deposition of J. B. Eddy, taken before Special Commissioner J. A. Sladen, and the deposition of G. W. Harper, taken before United States Commissioner J. W. Marshall at Spokane, Washington, have been submitted to the special examiner, and also, on January 19, 1901, at 1:30 o'clock P. M., pursuant to due notice given to each of the parties to this suit, through their counsel respectively, the testimony of Susanne Gagnon, and the additional testimony of Mrs. Philomme Smith, the plaintiff, F. A. Smith, her husband, and Ed. Brisbow, all witnesses on behalf of plaintiff, was taken before the undersigned; on the 18th of January, 1901, a request was made of the undersigned, as commissioner, by Hon. John H. Hall, district attorney, representing defendant, to postpone the taking of the deposi-

tions on the following day, or, if that should not be done, then that the cause, after the deposition was taken, might be adjourned for one week, in order to give him as counsel for defendant, an opportunity to cross-examine the witnesses, if he wished to; accordingly, on January 19, 1901, after the testimony of the witnesses was taken before the special examiner, as above stated, the cause was adjourned until 10 o'clock in the forenoon of the 26th day of January, 1901, at the office of the said examiner, in the Pendleton Savings Bank Building, in Pendleton, Oregon, at which time and place the commissioner attended but no person appeared; and thereupon the taking of depositions in the cause was declared closed.

From all the evidence in the case your special examiner finds no cause to change any of the findings of fact which he heretofore submitted to the Court, and which was filed with the clerk of this Court on September 10, 1900, except in the following particulars:

I.

The ninth finding of facts heretofore made by the Commissioner is accurate, except that, in addition to the furrows plowed around the property, mentioned therein, there was also a fence, composed of posts and two wires, thereon, enclosing the property, which constitutes an additional improvement thereon, and this raises the total value of the improvements on the property about $200, so that those improvements at the time mentioned in that finding would be from $700 to $775.

II.

Finding of fact thirteen, on page 7: This finding should be so changed as to show that in addition to hav-

ing a furrow plowed around it, the five hundred and sixty acres of land also was enclosed with a wire fence, as above described.

With the above exceptions, the former report of your special examiner correctly shows all the facts which, in his judgment, are established by the evidence herein.

Respectfully submitted, this 26th day of February, 1901.

CHAS. H. CARTER,
Special Examiner.

Filed March 1, 1901. J. A. Sladen, Clerk United States Circuit Court, District of Oregon.

And afterwards, to wit, on the 3d day of May, 1901, there was duly filed in said court exceptions to findings of special examiner, in words and figures as follows, to wit:

In the Circuit Court of the United States, for the District of Oregon.

PHILOMME SMITH,
Plaintiff,

vs.

HY-YU-TSE-MIL-KIN,
Defendant.

Exceptions to Findings of Special Examiner.

To the Honorable Judges of the Above-entitled Court:

Comes now the defendant above named, by John H. Hall, United States Attorney, appearing in his behalf

and on behalf of the United States, and excepts to the findings of fact heretofore made by Chas. H. Carter, as special examiner, in the above-entitled suit made and filed by him herein as follows, to wit:

Defendant excepts to the first finding of fact that plaintiff is a full-blooded Indian woman, or now is a member of the Walla Walla band or tribe of Indians, for the reason that said finding of fact is not supported by the evidence produced before said special examiner.

Second. Defendant excepts to all that portion of the ninth finding of fact wherein the examiner finds that the property in controversy at the time of the allotment was enclosed with post and wire fences, and that a barn was built by plaintiff thereon prior to allotment, and the finding that the improvements thereon were of the value of from $700.00 to $775.00, for the reason that said portions of said findings are not supported by the evidence produced before the said examiner.

Third. Defendant excepts to that portion of the tenth finding of fact wherein the special examiner finds that plaintiff at the time of allotment had possession of the land in controversy, and wherein he finds that plaintiff requested the allotting commissioner to allot said land to her.

Fourth. Defendant excepts to the twelfth finding of fact wherein the examiner finds that while before the lands in controversy were allotted to this defendant, and while the allotting agents were engaged in allotting the lands on said reservation plaintiff asked to be allotted upon the one hundred and sixty acres of land in contro-

versy, for the reason that said finding is not supported by the evidence produced by the special examiner.

Fifth. Defendant excepts to the thirteenth finding of fact wherein the examiner finds that the five hundred and sixty acres of land was enclosed with a wire fence, in addition to having a furrow plowed around it, for the reason that said finding is not supported by the evidence produced before the special examiner.

Sixth. Defendant excepts to that portion of the fifteenth finding of fact wherein it is found that defendant never paid plaintiff any money at all in any manner for any improvements which plaintiff had upon any part of the lands in controversy, for the reason that said portion of said findings is not supported by the evidence produced before the special examiner.

JOHN H. HALL,
United States Attorney.

Filed May 3, 1901. J. A. Sladen, Clerk United States Circuit Court, District of Oregon.

And afterwards, to wit, on Wednesday, the 10th day of July, 1901, the same being the 79th judicial day of the regular April term of said Court—Present, the Honorable CHARLES B. BELLINGER, United States District Judge presiding—the following proceedings were had in said cause, to wit:

In the Circuit Court of the United States, for the District of Oregon.

PHILOMME SMITH,

Plaintiff,

vs.

HY-YU-TSE-MIL-KIN,

Defendant.

Decree.

Now, at this time, this cause coming on for final hearing upon complainant's bill and defendant's answers thereto and plaintiff's replication, and the evidence heretofore taken, and the findings of the special master in chancery filed herein, and the exceptions of the defendant to certain specified portions of the findings of fact of the special master, plaintiff appearing by R. J. Slater, her solicitor, and the defendant appearing by Hon. J. H. Hall, United States District Attorney, and the cause having heretofore been fully argued and submitted, and by the Court taken under advisement, and, being now fully advised in the premises, the Court finds that the exceptions to the findings of the special master are not well taken, and said exceptions are therefore overruled.

Wherefore, it is ordered, adjudged, and decreed, that the said report of the said special master in chancery in

this court, C. H. Carter, be, and the same is in all respects, confirmed. And it is further ordered, adjudged, and decreed, that the allotment heretofore made by J. B. Eddy and J. P. Bushee, as commissioners of the United States of America, of the following land, situate upon the Umatilla Indian Reservation, in Umatilla county, State of Oregon, to wit: The southeast quarter of section twenty (20), township three (3) north, of range thirty-four (34), E. W. M., to the defendant, Hy-yu-tse-mil-kin, which allotment was approved by the Honorable Secretary of the Interior, April 12, 1893, be, and the same is hereby, canceled. And said land is hereby allotted to the plaintiff, Philomme Smith, and plaintiff is entitled to the immediate possession thereof; and the defendant, Hy-yu-tse-mil-kin, his servants, and all persons holding under him as tenants, lessors, or otherwise, are perpetually enjoined and restrained from in any manner interfering with the plaintiff's possession thereof, and that said complainant have and recover from the defendant her costs and disbursements incurred in this suit, taxed at one hundred and thirty-seven and sixty-two one-hundredths dollars.

Dated this 10th day of July, A. D. 1901.

(Signed) CHARLES B. BELLINGER,
Judge.

Filed July 10, 1901. J. A. Sladen, Clerk United States Circuit Court, District of Oregon.

And afterwards, to wit, on the 10th day of July, 1901, there was duly filed in said court an opinion, in words and figures as follows, to wit:

In the Circuit Court of the United States, for the District of Oregon.

PHILOMME SMITH,

Plaintiff,

vs.

HY-YU-TSE-MIL-KIN,

Defendant.

Opinion.

R. J. SLATER and J. F. HINKLE, for the Plaintiff.
JOHN H. HALL, as United States Attorney, for the Defendant.

BELLINGER, J.—The plaintiff is a full-blooded Indian woman of the Walla Walla tribe, having a white man for her husband. Prior to the allotment of lands on the Umatilla Indian Reservation to the confederated bands of Cayuse, Walla Walla and Umatilla Indians residing thereon, made in pursuance of the act of Congress of March 3, 1885, and during the year 1887, plaintiff made selection of the land in controversy, and had the same assigned to her by the reservation agent. She and her husband caused furrows to be plowed around the land so assigned, enclosed the same with a barbed-wire fence of two wires, dug a well, and erected some buildings. The

entire improvements, according to the finding of the referee, were of the value of from $700 to $775.

The allotment of lands was made early in the year 1891 by commissioners appointed for that purpose. Some years previous to this a census roll of the tribe to which plaintiff belonged was made up under the direction of the Interior Department, which did not include plaintiff's name, she being absent from the reservation at the time. A later list was made out containing the name of plaintiff among others, and this was forwarded to the Department at Washington. Whereupon the allotting commissioners were instructed to make inquiry as to the rights on the reservation of the subsequently listed persons. The commissioners took the testimony of the Indians in relation to the rights of these people and sent that testimony to the commissioner of Indian affairs at Washington, who decided that such Indians were not entitled to lands, and directed that no allotments be made to them. Accordingly, the commissioners refused to allot to plaintiff the lands selected and improved by her, but allotted them to the defendant. The decision of the Department against plaintiff's right to an allotment of lands was subsequently reconsidered and reversed, upon the advice of the Assistant Attorney General that his former opinion against plaintiff's right should not be followed and that the applicant was entitled to an allotment. Whereupon other and less valuable lands were allotted to the plaintiff, who accepted the same with the reservation that her act should not prejudice her right to the land in question and after the agent, in answer to her question, had informed her that in his opinion it

would not do so. She has leased a part of the land so allotted and received rental therefor.

The right of the plaintiff to an allotment having been decided in her favor, it does not appear upon what ground the Department refused to cancel the allotment made to the defendant, of the lands selected and improved by the plaintiff, and to allot such land to the plaintiff.

It is contended for the defendant that this refusal is conclusive of the question in this court, under the provisions of the act of March 3, 1885 (23 Stat. at Large, 340), which provided among other things, that the Secretary of the Interior shall have power to make needful rules and regulations to carry into effect the provisions of the allotting act, "and shall have power to determine all disputes and questions arising between Indians respecting their allotments." But the later act of August 15, 1894 (28 Stat. at Large, 305), confers upon the proper Circuit Courts of the United States "jurisdiction to try and determine any action, suit, or proceedings arising within their respective jurisdictions, involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any law or treaty."

Under this act jurisdiction has been exercised by a Circuit Court of the United States in a case like this to decree relief, notwithstanding the decision of the question by the Land Department. (Sloan vs. United States, 95 Fed. 193.) Jurisdiction is by this act conferred in terms that leave nothing to construction.

The findings of the special examiner are supported by the testimony which he reports. It is established by this

testimony, and has been decided by the Department, that the plaintiff is entitled to an allotment of lands. The act of Congress provides that allotments shall be made upon the selection made by the head of the family. The lands claimed were selected by plaintiff, who took possession of them and made considerable improvements thereon. This possession continued for a number of years, and until she was forcibly dispossessed by the action of the agents of the Government. If she was entitled to an allotment of lands, she was entitled to those lands, but for the decision of the department, subsequently reversed, there is no doubt but that the land claimed would have been allotted to her. If, then, a wrong has been done her, why should she be denied redress? Upon what principle of equity shall she be estopped to claim the relief prayed for, by the subsequent allotment of other lands to her? No one has been misled or prejudiced by that act. It was done in good faith, upon the advice of the agent and with the understanding that the plaintiff's right in the premises should not be thereby affected. If she has had rental from the allotted lands, it is presumably not more than she would have received from the more valuable land which she selected.

It is argued that she is not entitled to relief, because she has not offered to surrender the lands allotted her to the United States. No act on her part is necessary to extinguish her right in the allotment made her. The prayer of her complaint authorizes the canceling of such allotment in granting the relief which she asks. The defendant took with notice of plaintiff's rights. The man who reaps where others have sown cannot invoke an es-

toppel against those whose labor he appropriates. The defendant's consciousness of this is shown by his denial in his testimony that there were improvements of any kind on this land when it was allotted to him, although the fact is otherwise, and there is no question about it.

The plaintiff is entitled to the relief prayed for, and it is decreed accordingly.

Filed July 10, 1901. J. A. Sladen, Clerk United States Circuit Court, District of Oregon.

And afterwards, to wit, on the 24th day of July, 1901, there was duly filed in said court a cost bill, in words and figures as follows, to wit:

In the Circuit Court of the United States, for the District of Oregon.

PHILOMME SMITH
vs.
HY-YU-TSE-MIL-KIN.

No. 2,595.
July 17, 1901.

Cost Bill.

Statement of disbursements claimed by the plaintiff in the above-entitled cause, viz.:

Clerk's fees	$26.00
Marshal's fees	32.32
Costs in State Circuit Court	
Attorneys' fee	20.00
Attorney's fee for taking ——— depositions, at $2.50 each	
Depositions	

Examiner's fees..... ....

Referee's fees..... .....

Witnesses' fees: F. A. Smith, 2 days and 30 miles travel..... .... 4.50

Ed Frisbo, 2 days and 10 miles travel..... .... 3.50

Mrs. Kitsin, 1 day and 30 miles travel..... .... 3.00

Fees of Special Master, C. H. Carter, $68.60, one-half charged..... ..... 34.30

Stenographer, J. S. Beckwith, $28.00, one-half charged..... .... 14.00

Total taxed at.....$137.62

J. A. SLADEN,
Clerk.

District of Oregon—ss.

I, R. J. Slater, being duly sworn, on my oath say that I am one of the attorneys for the plaintiff in the above-entitled cause; that the disbursements set forth herein have been actually and necessarily incurred in the prosecution of this suit; and that said plaintiff is entitled to recover the same from the defendant, as I verily believe.

R. J. SLATER.

Subscribed and sworn to before me this 20th day of July, 1901.

[Seal] J. T. HINKLE,
Notary Public for Oregon.

[Endorsed]: Filed July 24, 1901. J. A. Slater, Clerk.

And, to wit, on the 10th day of September, 1900, there was duly filed in said court the testimony taken before Charles H. Carter, special examiner, accompanying findings, in words and figures as follows, to wit:

Certificate of Special Examiner.

United States of America,
District and State of Oregon. } ss.

I, Chas. H. Carter, special examiner of the Circuit Court of the United States for the District of Oregon, in the cause in equity therein pending wherein Philomme Smith is complainant and Hy-yu-tse-mil-kin is defendant, hereby certify that pursuant to agreement between the parties aforesaid, by their solicitors and attorneys, the testimony in this cause was taken at 10 o'clock A. M., on July 31, 1900, at the courthouse of Umatilla County, Oregon, in the city of Pendleton, in that county, at which time the said parties and their respective attorneys and solicitors in person attended; that all of the witnesses then introduced by both parties were by me sworn to tell the truth, the whole truth, and nothing but the truth before they were examined or allowed to testify; that plaintiff introduced three witnesses, to wit: W. A. Smith, Philomme Smith, and Edward Brisbo, and defendant introduced four witnesses, to wit: Louis Chalifoe, Albert Minthorn, the defendant, Hy-yu-tse-mil-kin, and Charles Wilkins; that by special agreement between the parties, by their said attorneys, then made, the signing of their respective depositions by the witnesses was waived, and the testimony of the said witnesses was taken by J. S. Beckwith, in shorthand, and by him transcribed upon the

typewriter, and the same is herewith returned to the clerk of the said Circuit Court; and that the said testimony was taken between the hours of 10 o'clock A. M. and 6 o'clock P. M., the parties and their said attorneys being present the whole day before me at said time and place; that all of said testimony, together with all exhibits introduced, are herewith returned to the clerk of the said Circuit Court.

Dated this 7th day of September, 1900.

CHAS. H. CARTER,
Special Examiner.

In the Circuit Court of the United States for the District of Oregon.

IN EQUITY.

PHILOMME SMITH,
Plaintiff

vs.

HY-YU-TSE-MIL-KIN,
Defendant.

Testimony Accompanying Findings of Special Examiner.

This cause coming on regularly for the taking of the testimony in said cause before Honorable Charles H. Carter, the duly appointed, qualified and acting special referee therein, on this the 31st day of July, 1900, at the courthouse in Pendleton, Umatilla county, Oregon, at the hour of ten o'clock of said day, when the following proceedings were had, to wit:

The plaintiff appearing in person and by her counsel, J. H. Slater, and the defendant appearing in person and by his counsel, John H. Hall, United States Attorney.

W. A. SMITH was called as a witness on the part of the plaintiff, testified as follows, being first duly sworn by the special referee.

Direct Examination.

(By Mr. SLATER.)

Q. State your name, age, residence and occupation.

A. My name is W. A. Smith; my age is going on sixty-six years; farming is my occupation; I reside on the reservation, Umatilla county.

Q. What relation do you sustain to the plaintiff, Philomme Smith? A. She is my wife.

Q. When were you married to her?

A. The 16th of January, 1861.

Q. Where? A. The Dalles, Wasco county.

Q. How old was she when you married her?

A. I understood—we didn't know for certain, her age—I understood she was going on thirteen.

Q. From whom did you get that information?

A. From her mother.

Q. Was her mother with her? A. Yes, sir.

Q. Who was her mother?

A. She claimed to be a Walla Walla Indian.

Q. Was she a full-blooded Indian? A. Yes, sir.

Q. Do you know anything about the father of your wife? A. Only hearsay; I never seen him.

Q. Where was he at the time you married your wife?

A. He was dead.

Q. Do you know how long he had been dead?

A. I do not; several years, though.

(Testimony of W. A. Smith.)

Q. From the conversations with your wife's mother can you testify as to her blood; whether she was a white person or an Indian person?

A. I should say she was a full-blooded Indian; she had that appearance.

Q. What language did she speak?

A. Four or five different languages—Indian languages; Walla Walla, Cayuse and some Snake.

Q. Were you familiar with these languages?

A. No, sir; not particularly; I can't say I was.

Q. Could you talk any of them? A. No, sir.

Q. Could you distinguish them?

A. I could distinguish the Walla Walla and Wasco Indians.

Q. State if you know, where your wife and her mother were living at the time you married your wife.

A. They were living at the Dalles.

Q. Was that their home?

A. They were just merely coming from home, from the French Prairie.

Q. Were they traveling? A. Yes, sir.

Q. In what direction? A. Coming up this way.

Q. When did you first come to the Umatilla Reservation?

A. To live, or the first time I ever saw them?

Q. To live. A. I came in 1888 to live here.

Q. Who came with you?

A. My wife and family and her sister.

Q. Have you any children by this woman?

(Testimony of W. A. Smith.)

A. I had eight.

Q. How many were with you when you came to the reservation?

A. One of them came in the fall of 1887 before me.

Q. How many came with you? A. Seven.

Q. Why did you come to the reservation?

A. I came to take land on the reservation.

Q. Who gave you authority to come on the reservation? A. The agent and the Indian chiefs.

Q. What agent? A. Mr. Coffee.

Q. What chiefs? A. Homily and Showaway.

Q. Who was Homily?

A. The Walla Walla chief.

Q. Who was Showaway? A. The Cayuse chief.

Q. You are familiar with the land in controversy in this matter, are you not? A. Yes, sir.

Q. When you got on the reservation what did you do?

A. I marked that piece of land off as land for our family.

Q. How did you happen to do that?

A. We wanted to take a home for the family.

Q. Did you consult anybody about it?

A. I consulted Coffee, the agent, and Homily.

Q. What did Homily tell you?

A. He said take the land.

Q. How much did you take?

A. Five hundred and sixty acres.

Q. Why did you take five hundred and sixty acres?

A. Because my family and wife were all entitled to five hundred and sixty acres.

(Testimony of W. A. Smith.)

Q. You did this for your wife?

A. And eight children.

Q. You had no rights of your own on the reservation?

A. No, sir.

Q. You are a white man? A. Yes, sir.

Q. You claimed no rights on the reservation. You did this in the right of your wife and her children?

A. Yes, sir.

Q. State what you know from the history of your wife's family as to where she was born.

(Objected to by counsel for the Government unless he knows, as incompetent.)

A. I don't know; all I know about it is what I heard.

By the COURT.—If he knows anything about where she was born he can say so.

A. I don't know where she was born, only what I heard.

Q. From whom did you hear anything about that matter? A. From her mother.

Q. From what her mother told you please state what you know about where she was born.

(Same objection by counsel for the defendant. Objection sustained, and the witness instructed that he may answer, because counsel for the plaintiff insists upon an answer.)

A. She told me she was born at Wallula.

Q. State, Mr. Smith, when it was your wife and family first took possession of this land in controversy.

A. I marked that land off in April, 1888, and a little

(Testimony of W. A. Smith.)

while after that I went to work on it and took a plow and plowed around it.

Q. Were there any improvements on the land at that time? A. No, sir.

Q. Was anybody in possession of it at that time?

A. I never heard of anybody being on the place at all. There was nothing there.

Q. Did your wife move upon that tract of land?

A. No, sir; she never lived upon that particular tract.

Q. Where did she live?

A. Right across from that on another piece of land.

Q. Was that a part of the five hundred and sixty acres she selected? A. Yes, sir.

Q. State what improvements your wife made upon this particular tract of land.

A. There was a house, a small cabin built for a granary, and there was a barn built on it, and a well dug on it, and a few years ago I built another barn on it.

Q. Any other improvements?

A. And fences; a mile and a quarter of fence.

Q. Describe how the place was fenced.

A. It is the southwest corner of the piece and I run for a half mile and joined in with John Ralston, and run south to the corner where John Ralston's place is, for a half mile and turned north again and run for a quarter of a mile, and then ran it to McDaniel's corner, and then run north a quarter and then joined with McDaniel.

Q. Did this fencing inclose the whole tract?

A. Yes, sir.

Q. What was the character of the well you dug there?

(Testimony of W. A. Smith.)

A. We dug a well forty-five feet deep.

Q. What kind of material did you get there?

A. Most of it was hard rock.

Q. What was the reasonable value of these improvements?

A. Well, I think the well was worth $250, and the barn worth $250; the house is worth $75; the fence was worth, the posts were worth $6 delivered, and the wire $7.50—I gave for it; there was ten bales of wire—1,000 pounds, $75, and there was the posts at $6 per hundred and putting up the fence; two men could put the fence in two days; could dig the post holes and put it up in about five or six days.

Q. How long did your wife have possession of that place?

A. She lived on that place from the time we moved on in the fall, after we got the well started—we worked on the well that winter and that fall. We had possession of that place up until, I should think, about 1897; we lived there until 1897, but not right on that particular piece.

Q. Why did you leave it at all?

A. We were ordered to leave.

Q. By whom? A. By the Indian agent.

Q. Was your wife and family there in 1891-92, when the allotments were made? A. Yes, sir.

Q. What, if any, action did your wife take, in regard to selecting this particular quarter section of land as her allotment?

A. When they commenced allotting she claimed that

(Testimony of W. A. Smith.)

as hers; I went to the land agent and wanted him to allot it to her, and she went with me.

Q. What action did they take?

A. They said they couldn't allot us.

Q. Did they allot it?

A. No, sir; they never did.

Q. What did they do?

A. They never did anything in regard to allotting her.

Q. What reason, if any, did they give?

A. They said her name was not on the enrolled list.

Q. Who took possession of the land after you left?

A. I don't know; there was some white men there; Mosgroves took possession of it and farmed it.

Q. Do you know by what authority?

A. I don't know; only they decided we had to give up the land.

Q. Did you ever see the defendant on the land?

A. Yes, sir; I seen him when the land was appraised.

Q. Did you ever talk with him about it?

A. No, sir; I never did; I couldn't talk with him.

Q. At the time this appraisement you speak of was made, who made that appraisement?

A. Mr. Harper, the agent, and Guyer, the clerk.

Q. Who was Harper?

A. The agent of the Umatilla Indian Reservation.

Q. At the time these allotments were made was your wife living upon this tract?

A. Right opposite that piece of land.

Q. She was not living on the land in controversy?

(Testimony of W. A. Smith.)

A. No, sir; she never lived on that piece.

Q. How far away?

A. About twenty steps, inside another field.

Q. Why didn't she live on that piece?

A. Because I built on what is known as the children's land.

Q. They had not at that time divided up the land?

A. No, sir.

Q. All living there together? A. Yes, sir.

Q. You held the place, then, as a family farm?

A. Yes, sir; the oldest son he claimed land separate, which run across the line, and he claimed his separate, because he was twenty-five or thirty years old.

Q. Do you know whether or not the defendant had any knowledge of your wife's claim upon this land?

A. He must surely, because it was fenced before he allotted on it; he claimed other land right above me there.

Q. Prior to that time? A. Yes, sir.

Q. Where was that?

A. Right east of the piece in dispute.

Q. Do you know why he didn't select that land?

A. He got in a lawsuit and another Indian took it away from him, I believe; that is what I understand.

Cross-Examination.

(By Mr. HALL.)

Q. How long had you been living at The Dalles when you were married?

(Testimony of W. A. Smith.)

A. I came there in 1857; that is, I came back; I went there in 1852; I went to Southern Oregon and came back.

Q. How long had your wife been living there when you were married?

A. She came there in the fall of 1860, and along in the spring of 1861 I married her.

Q. Were they camping there or living in a house?

A. They were living in a house; they had been camped; her sister and folks, they had been camping and had moved off down the river on a ranch; they had taken up a ranch.

Q. What was her mother doing there for a living?

A. She was stopping with her sister at that time. After I married her, my wife—she was stopping at The Dalles with another family I was acquainted with, and I married her there.

Q. White people?

A. No, sir, Indians; that is, the woman's husband was white, and the woman was an Indian.

Q. What language did your wife speak then?

A. French and Chinook; at that time she couldn't speak the Walla Walla language.

Q. She talked good French?

A. Very good French, I guess.

Q. Did you reside at The Dalles from 1861 until 1888?

A. In that vicinity; in that county; one summer I went across to Mount Adams.

Q. How did you happen to be here to make the selections?

(Testimony of W. A. Smith.)

A. McDaniels and several Indians spoke to us and told us to come over here—they were down there visiting —and they told us we belonged here and to come and get our land.

Q. And that is all you knew about it?

A. That is all I knew; told us to come and get our rights.

Q. They were just passing there?

A. No, sir; they came there to visit my wife's mother and the family. I didn't know the Indians myself, but they knew my wife's mother when she had been in this country. Her husband and her were traders, or trappers; she was the wife of an old trapper, who used to be all through this country.

Q. A white man?

A. No, sir; he was an Indian, so they said; I never seen the man.

Q. You came here in 1888 and you settled on the northeast quarter of section 29?

A. We had taken that land up.

Q. That is where you built your house?

A. Yes, sir.

Q. And your barn?

A. No, sir; I built another barn in 1889.

Q. What improvements did you put on section 29?

A. I built a house and fenced it up.

Q. When did you build the house?

A. In the fall of 1888.

Q. So that all the improvements were put on that year?

(Testimony of W. A. Smith.)

A. No; I fenced up some of the land.

Q. What land? A. That on section 29.

Q. What improvements did you make in 1889?

A. On that identical piece?

Q. Yes, sir; when did you make the first improvements on the southeast quarter of section 20, being the land here in controversy?

A. In section 20, in 1888 was the first improvements I made on that.

Q. What were they?

A. Plowing around it, marked it off and digging a well, or starting the well, rather.

Q. You dug a well, starting it by digging a hole six or eight feet deep and left it, didn't you?

A. No, sir; I dug a hole twenty-seven feet, I think it was, before I got down in the hard rock, then I got another man to help me.

Q. Was that in 1888? A. Yes, sir.

Q. How deep did you sink that well in 1888?

A. Twenty-seven feet, I think.

Q. You didn't get water? A. No, sir.

Q. You then abandoned it?

A. No, sir; kept working on it when I had time.

Q. When did you reach water with that well?

A. In 1889, I think.

Q. Did you do that yourself?

A. I helped do it.

Q. It was under your supervision?

A. Yes, sir.

(Testimony of W. A. Smith.)

Q. Did you pay for it? A. Part of it.

Q. Who paid for the other part of it?

A. Rube Wilson.

Q. Why?

A. Because he had land rented near it.

Q. In what part of the section was that?

A. In section 29; he had the northwest quarter of section 29 and one-half of the northeast quarter of section 29.

Q. One-half of the east half?

A. No, sir; of the west half.

Q. And that is where your house was?

A. No, sir; the house was close to it.

Q. Wasn't your house on the northwest quarter of section 29? A. No, sir; on the east half of 29.

Q. Where was the well—immediately north of that?

A. Yes, sir; immediately north of that.

Q. How much of this well did you dig at the time this man Wilson helped you?

A. From twenty-seven feet down; he helped dig the balance of it until we struck water.

Q. How deep was it? A. Forty-five feet.

Q. Was that dug in 1889?

A. I think it was; we commenced in 1888 and finished it in 1889—I think in the fall of 1889 we got water.

Q. What is the ordinary cost per foot of digging a well out there when you let it by contract? What did this well cost?

A. A good deal; I don't know exactly.

Q. Do you know about what it cost?

(Testimony of W. A. Smith.)

A. I don't know exactly; I know it cost a terrible lot; I had to buy giant-powder, fuse and hired men. I think I paid one man $29.00, but he didn't do much; he made it a little larger around; that is all. I waited on him awhile and he was picking around. I know I was $29.00 out.

Q. You say you made these selections by going out on the place, selecting the land and plowing around it?

A. Yes, sir.

Q. Was that before you moved or not?

A. Before I moved; I came here and selected that land and then went away and then came back.

Q. Did you leave your family in The Dalles?

A. Yes, sir; and then we came up to see if we could get the land.

Q. You were doubtful about it? A. Yes, sir.

Q. What other improvements did you put upon section 29 in 1889? A. Built a barn on it.

Q. How big was it?

A. I think twenty by twenty-four or twenty-six feet. I am not sure, but I think twenty by twenty-four.

Q. It was a log barn covered with shakes?

A. Yes, sir.

Q. How much did it cost you? A. I don't know.

Q. This other man helped you build it?

A. Yes, sir; and there is a fourteen-foot shed on each side of the barn all covered with shakes.

Q. You went in and built it together?

A. No, sir; I had the man hired to help me.

Q. You didn't have this man Rube Wilson hired?

(Testimony of W. A. Smith.)

A. No, sir; he didn't help me.

Q. How much did the barn cost you?

A. I guess about $250.00, labor, shakes and everything.

Q. How do you figure it?

A. I imagine it cost about that much.

Q. Did you figure it up? A. No, sir.

Q. How far did you go for timber?

A. Twelve or fifteen miles.

Q. You guessed it at $250.00?

A. Yes, sir; with the lumber that made the sheds on each side.

Q. What was the lumber worth?

A. Seventeen dollars I think I paid for rough lumber.

Q. What other improvements did you make in 1889, if any?

A. I don't think I made any except in the fence; no, I didn't build that fence that year, only a little around it.

Q. In 1890 what improvements did you make on that piece?

A. We built a cabin there for holding the ground.

Q. How big a cabin?

A. I think fourteen by sixteen feet.

Q. What did you build it out of?

A. Logs.

Q. What do you estimate that cost you?

A. Seventy-five dollars.

Q. That was a kind of granary?

(Testimony of W. A. Smith.)

A. Yes sir; we used it for a granary to store our barley or wheat in.

Q. You never lived in it?

A. No, sir; the hired man slept in there occasionally.

Q. Did you make any other improvements there in 1890?

A. I think I put the fence, or the balance of it up in 1890; I would not swear positively whether it was 1890 or 1891.

Q. Was it one of those years? A. Yes, sir.

Q. That you say was a post and wire fence?

A. Yes, sir.

Q. How many wires? A. Two wires.

Q. According to your estimate that fence would cost you about $320.00?

A. I never figured it up. I know it cost about $7.50 for wire per hundred.

Q. You gave the figures at 1,000 pounds of wire at $7.50, $75.00, four hundred posts at six cents, $240.00, and $5.00 for setting, which makes a total of $320.00. All of these improvements, then, you say was put on prior to 1892?

A. Yes, sir; they were all put on prior to 1892.

Q. Did you put anything on there after 1892?

A. I think I put on another wire fence around the barn. It was taken down a time or two and put around the house on the other side, and then I went back and put on three wires.

Q. That was after these allotments were made to the defendant?

(Testimony of W. A. Smith.)

A. No, sir; I think they were put on before—yes, I know it was.

Q. Some of the improvements you put on after the allotments?

A. Yes, sir; the barn was put on afterwards.

Q. That is the barn you claim cost $250?

A. I claim $300 for that.

Q. Do you claim two barns, one $250 and another $300? A. Yes, sir.

Q. Was that all the improvements you placed on after the allotment?

A. Yes, sir; nothing else after the allotments.

Q. Did you ever receive any money from the agent or the defendant, Hy-yu-tse-mil-kin, for any of these improvements?

A. No, sir; I never received a cent or heard of any.

Q. Did you not have a conversation with Hy-yu-tse-mil-kin, yourself and him being present on the reservation, wherein you agreed with him in regard to what your improvements would be and what he should pay you?

A. I never talked with him at all.

Q. Did you ever talk with him through an interpreter?

A. No, sir.

Q. Did you ever talk with Harper, the agent, as to what you should be paid for it—was nothing ever said about any payments to your wife?

A. No, sir.

Q. Your wife never had anything much to say about the management of the place—you did that?

A. Most generally; yes, sir.

(Testimony of W. A. Smith.)

Q. When the allotting agents came you made these selections?

A. I made the selections before the allotting agents ever came.

Q. And when he did come you reselected them?

A. My wife and children did.

Q. Your wife never had anything to do with it?

A. Yes, sir; the Indians came when I was away and told her to take the land.

Q. You made the demand upon the allotting agents yourself? A. Yes, sir; but she went with me.

Q. You did the talking? A. Yes, sir.

Q. You afterwards made another selection, didn't you, of land after you had been ousted of this?

A. We selected some two or three years ago perhaps.

Q. You selected one piece, didn't you, and gave that up and then selected another?

A. Yes, sir; we selected one piece and gave it up and selected another.

Q. Your wife now holds as an allottee lots 13 and 14, section 36, township 3 north, of range 33 east, and lot 3 of section 5, township 2, and the southwest quarter of the northeast quarter of section 33, does she not?

(Objected to by counsel for the plaintiff as incompetent, immaterial, and irrelevant, for the reason that if there is any such allotment the record is the only and best evidence.)

Q. She is not in possession of that land?

A. No, sir.

(Testimony of W. A. Smith.)

Q. Is she not in possession as landlord and having a tenant upon it?

A. She has a tenant on 36.

Q. In section 36? A. Yes, sir.

Q. Will you say it is not in 33?

A. I would not swear positively, but the land we selected, she signed a lease for. I think though, it is in 36.

Q. How long ago was that?

A. Three or four years ago, the first time we leased it, and then she leased it again for two crops last fall or winter, I think it was, I don't remember the time we leased it, but it was to a man by the name of Snyder.

Q. Who gets the rents and profits?

A. She got part of it; he didn't pay it all.

Q. Who did he agree to pay it to?

A. To her.

Q. How much an acre does she get for it?

A. Three dollars per acre.

Q. Has that been the rental price since she has been renting it?

A. No, sir; I think the first rental price was $2.50.

Q. Is that the least she has rented it for?

A. Yes, sir.

Q. Eighty acres?

A. There is only seventy acres, he told me.

Q. He has other lands of hers that she is in possession of? A. No, sir.

Q. Isn't she in possession of forty-six and twenty-one hundredths acres? A. No, sir.

Q. Do you know whether or not there was that amount of land which was allotted to her?

(Testimony of W. A. Smith.)

Q. Did you understand at that time, or did your wife at any time go to the agent and make a selection of that land? A. No, sir; she never did.

Q. What has she done towards giving up her claims to the land in controversy?

A. She has never given them up at all.

Q. Who did she tell that?

A. She told it to me and several.

Q. Do you know whether she ever told the agent or not?

A. I don't know whether she ever told the agent or not; she was only there once or twice.

Q. Was your wife present at the time Harper talked to you about this land? A. No, sir.

Recross-Examination.

Q. You never plowed or raised any crop on the south-east quarter of 20?

A. I plowed it; a good deal of it.

Q. You never raised any crop upon it?

A. No, sir.

Q. How much did you plow?

A. The biggest part of the quarter,

Q. Isn't it a fact you run a fence around it and used it for pastures? A. I used it for pastures; yes, sir.

Q. The only use you made was for pasture?

A. I started in to plow it.

Q. The only benefit you ever had of it was for pasture?

A. That is all.

(Testimony of W. A. Smith.)

Redirect Examination.

Q. Why didn't you get the use of your plowing?

A. I was stopped by the agent.

Q. When was that?

A. I think that was in 1891 or 1892; I am not positive.

Q. Did you ever improve this other land you say you selected? A. No, sir.

Q. Why didn't you do that?

A. This last piece—seventy or eighty acres? I was only on that once that I remember of, since it was fenced. That was the time I went to look at it.

Q. What kind of a piece is it for making a home upon?

(Objected to by plaintiff's counsel as immaterial.)

A. I don't think I should like to live upon it.

Q. There is no water upon it?

A. They say there is not.

Q. How does it lay with reference to the Umatilla River?

A. It lays about a mile from the Umatilla River, right along on the hill, on the face of the hill, like; a big canyon goes right down through it—on this end of it at least—east and west and on this side of it there is a steep hill.

Q. Is it such a place as your wife would be inclined to select as a home? A. No, sir.

Recross-Examination.

Q. Where do you live now?

A. Up here on the reservation.

Q. On whose land?

A. Piece I selected for one of my children.

(Testimony of W. A. Smith.)

Q. Which one? A. William Smith.

Q. When was he allotted?

A. He never was allotted; none of them was ever allotted.

Q. How did he get this land?

A. I took it for him; we had other land.

Q. How did he get land on the reservation without being allotted?

A. There is a good many people—I took the land myself for him—he has a right on the reservation, and had land on the reservation and fenced and farmed it.

Q. What section is that in? A. I don't know.

(By the COURT.)

Q. To whom was that land allotted that your son William is living on?

A. The forty was allotted to Be Yet.

Q. You say your son, William Smith, occupies some land in his own right?

A. No, sir; I claim that—when they were allotting the land they throwed him out entirely—then he died and I took this piece up that I am now living on.

Q. To whom is this piece you now live on allotted?

A. To no one that I know of.

(By Mr. SLATER—Resuming.)

Q. You mean you selected that as his allotment—from whom? A. Harper.

Recross-Examination.

Q. You mean after he was dead?

A. Yes, sir; after he was dead.

Mrs. W. A. SMITH, called and sworn as a witness on the part of the plaintiff, testified as follows—Edward Brisboe sworn as interpreter.

Direct Examination.

(By Mr. SLATER.)

Q. State your name. A. *Philomay* Smith.

Q. How old are you?

A. She thinks she is about sixty-five; she is not positive.

Q. Where do you live?

A. At the present time she says she lives on the reservation.

Q. How long have you lived there?

A. Eleven years.

Q. Are you an Indian woman? A. Yes, sir.

Q. Who was your mother?

A. She was a half Walla Walla and half Umatilla.

Q. Where did your mother live?

A. She was raised here and kept traveling; lived in different parts of Walla Walla Valley.

Q. Where were you born?

A. She was born over here—down to Wallula Junction.

Q. Who was her father?

A. He was an Iroquois.

Q. What did he do for a living?

A. He was traveling around like the rest of the trappers.

Q. Who did he trap for?

A. She don't know who for.

Q. What relation is W. A. Smith to her?

(Testimony of Mrs. W. A. Smith.)

A. Her husband.

Q. When did she marry Smith?

A. She don't know when she did marry him; she forgot the date.

Q. Where did she live at that time?

A. The Dalles.

Q. When did she come to the Umatilla Reservation?

A. Eleven years ago.

Q. Who told her to come to the reservation?

A. There was several wrote to her to come there; said she had a right over here as much as the rest of them.

Q. Did she take some land when she came on the reservation?

A. At first she came on a visit to see how the matter stood and then went back.

Q. Who did she talk with at that time?

A. She had a talk with Chief Homily.

Q. Anybody else?

A. And also Coffee, the agent there.

Q. What did he (Homily) tell her?

(Objected to by defendant's counsel as hearsay. Objection sustained.)

Q. Did Homily tell you to remain on the reservation?

A. Yes, sir.

Q. Did he tell you to take up land?

(Same objection by counsel for the defendant. Objection sustained by the Court.)

Q. Did he permit you to remain on the reservation; did he allow you to take land upon the reservation?

(Testimony of Mrs. W. A. Smith.)

A. Yes, sir; allowed them to take land.

Q. Did he show you where to go and get land?

A. Yes, sir; he went over and showed her what piece to take.

Q. Did you have any children at that time?

A. Yes, sir; had eight children.

Q. Did you select land for them as well as yourself?

A. Yes, sir.

Q. Do you know how much it was altogether?

A. No, sir; she don't know how much altogether.

Q. Did you mark this land out on the surface any way?

A. Yes, sir; she marked it with a plow.

Q. Did you go upon this land to live there?

A. Yes, sir.

Q. Did you live upon the land that you selected for yourself? A. No, sir.

Q. Were you living there upon the reservation and upon the land selected by you for your children when the allotting agents came to allot the land?

A. Yes, sir; she was stopping on her children's land.

Q. Did you go to the allotting agents and tell them that you wanted to select this land for yourself and children?

A. Yes, sir; she went and says they told her she didn't have her name on the list.

Q. Did they allot her any land at that time?

A. No.

Q. What did they do with the land she had selected?

A. Allotted it to somebody else. She says she stopped there until they drove them out of there.

(Testimony of Mrs. W. A. Smith.)

Q. Did she make any improvements on this land she had selected for herself?

A. All the improvements that was made are there yet, the one hundred and sixty acres she selected for herself.

Q. Why did she leave the land?

A. They told her she had no right to stay there and had to leave.

Q. Who told her that? A. Harper.

Q. Who was Harper? A. He was agent.

Q. Do you know anything about the value of the improvements? A. No, she don't.

Cross-Examination.

(By Mr. HALL.)

Q. Do you remember your father?

A. No, she was too young when he died.

Q. Where were you living when he died?

A. She was living in Willamette Valley when he died.

Q. Your mother was married to him down there, was she not? A. Yes, sir.

Q. At French Prairie?

A. She don't know where they were married at.

Q. She was born down there?

A. No, sir; she was born at Wallula Junction.

Q. That is what her mother told her?

A. Yes, sir.

Q. Where is her mother? A. Dead.

Q. How long has she been dead?

A. About fourteen years.

(Testimony of Mrs. W. A. Smith.)

Q. She never remembers of living up in this country, does she?

A. No, she don't remember when she lived in this country; she was too young.

Q. What language did her mother speak?

A. She used to talk Walla Walla, Iroquois, and French.

Q. Whereabouts on French Prairie did they live?

A. At a place called St. Paul.

Q. Does she know anybody in St. Paul now?

A. She used to know several there but don't know any now.

Q. Ask her if she knew Caalifou.

A. Yes, sir; she used to know Caalifou down there.

Q. What was your mother's name?

A. Her name was Francois.

Q. Was that the name she went by?

A. She says they called her Francis.

Q. Ask her if her mother had any other name.

A. She don't know; she might have had an Indian name.

Q. Ask her if she had any other French name besides that. A. Saufia was her husband's name.

Q. Her mother's name was Francis Saufia?

A. Yes, sir.

Q. Ask her if she can speak Walla Walla.

A. She understands it but cannot talk it.

Q. She learned that since she came here on the reservation?

A. Yes, sir; learned that much since coming here.

(Testimony of Mrs. W. A. Smith.)

Q. She never heard her mother speak Walla Walla?

A. Yes, sir; heard her speak Walla Walla.

Q. How old were you when you were married?

A. About fourteen years.

Q. Then you lived at The Dalles after you were married until eleven years ago?

A. Yes, sir; always stopped at The Dalles until we moved up here.

Q. Didn't you come up here at your husband's suggestion, to make a selection of land?

A. Yes, sir.

Q. When you came upon the reservation to get the land, didn't your husband make the selections of the land himself? A. Her husband did.

Q. She never selected any of this land herself at all?

A. Yes, sir; she took it herself.

Q. Her husband picked it out?

A. Yes, sir; her husband marked it out, then she picked out her place.

Q. The husband selected the whole tract and then she took her lot out of that?

A. Yes, sir; she took her piece off of that after it was marked.

Q. Ask her if her husband didn't furnish all the money to build the house and all the fencing that was done upon her piece of land.

(Objected to by plaintiff's counsel as incompetent, immaterial, and irrelevant. Objection overruled by the Court.)

(Testimony of Mrs. W. A. Smith.)

A. Yes, sir; she says he did.

Q. You never gave your husband any money to pay for the improvements that he put upon this land?

A. No, sir; she don't think she did.

Q. Did you ever rent this piece of land that you claim as yours, being the one given to Hy-yu-tse-mil-kin?

(Objected to by plaintiff's counsel as immaterial. Objection overruled by the Court.)

A. She says she never rented it to anybody.

Q. Did she ever raise a crop on it?

A. No, sir.

Q. Did she ever do anything with it except to put a two-wire fence around it and use it for pasture?

A. She can't recollect of it, she says.

Redirect Examination.

Q. Your husband is a white man, is he not?

A. Yes, sir; he is a white man.

Q. He came with you upon the reservation, didn't he?

A. Yes, sir; both came together on the reservation.

Q. The improvements he made upon this land and the money he paid for them was for your use and benefit, wasn't it?

(Objected to by defendant's counsel as leading and suggestive. Objection overruled.)

A. Yes, sir; she says it was.

Q. When your husband talked to the allotting agents you were with him, were you not?

(Objected to by defendant's counsel as leading and not in response to anything drawn out on cross-examination.

(Testimony of Mrs. W. A. Smith.)

Objection overruled by the Court as being preliminary question.)

A. Yes, sir; she was present.

Q. You understood what was said by him to the allotting agents, didn't you?

A. Yes, sir; she understood enough to hear him. He said her name was not on the list.

(Plaintiff's counsel then offered in evidence papers and letters identified as Plaintiff's Exhibit "A," which were duly admitted and marked Exhibit "A" as requested.)

Q. You were asked upon cross-examination about your mother's name; please state whether your mother was married more than once.

A. Yes, sir; she was married twice.

Q. What was her first husband's name?

A. Thomas Jauchin.

Q. What was the name of her second husband?

A. Saufia.

Q. Which was your father?

A. Thomas Jauchin.

Recross-Examination.

Q. How do you know?

A. Her mother told her so.

Q. Do you remember your father?

A. No, she was too young when her father died.

Q. How old were you when your mother married the second time?

A. She just recollects it; that is about all.

Q. How many years old were you?

(Testimony of Mrs. W. A. Smith.)

A. She can't say how old she was; she just recollects it; that is all.

Q. How old were you when Saufia died?

A. About ten or eleven years old.

Q. Were you always called Philimene Saufia?

A. Sometimes they used to call her that name.

EDWARD BRISBO, called as a witness on the part of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. SLATER.)

Q. State your name and age.

A. Edward Brisbo; aged about forty-seven.

Q. Where do you live?

A. On the Umatilla reservation.

Q. How long have you lived there?

A. On the reservation about fourteen years.

Q. Are you acquainted with the plaintiff, Philimene Smith?

A. Yes, sir; I am acquainted with her; have known her ever since they got back to this country.

Q. Were you acquainted with Homily, chief of the Walla Wallas, during his lifetime?

A. Yes, sir; I recollect him since I was knee high.

Q. Do you recollect the time when the plaintiff came to reside upon the reservation first? A. Yes, sir.

Q. Were you present at any time when Homily was present and the plaintiff, Philimene Smith, was present,

(Testimony of Edward Brisbo.)

when Homily and other Indians were considering her rights upon the reservation?

A. I was one time; yes, sir.

Q. Did you hear Homily make any statement in regard to the matter?

(Objected to by defendant's counsel as incompetent, immaterial, and irrelevant and hearsay evidence. Objection sustained by the Court as leading and hearsay.)

Q. State what was done at that time and what occurred at that time.

A. How do you mean what occurred? Where she was on the ground that she is in dispute about?

Q. At the time you say you were present when Homily was present and the plaintiff was present and her rights upon the reservation were being considered, state what was said and done at that time in regard to that matter.

A. There was a meeting held at the Agency; at the time Moorhouse was agent, and some one had a dispute over their right, and I was one of them, and that woman was there and Homily said I was one of them that belonged here on this reservation, that I was related to him, and also I belonged to this reservation, and also said that woman belonged the same as I did on the Walla Walla side. That is all he said in regard to the woman; that she belonged there, too.

Q. Do you know anything about this woman taking land on the reservation?

A. She already had marked her land.

(Testimony of Edward Brisbo.)

Q. Do you know whether Homily had anything to do with her marking that [illegible]d or not?

A. No, sir; I do not.

Cross-Examination.

Q. Isn't it a fact, Brisbo, that you and these other Indians had to pay Homily in order to get this allotment?

A. No, sir; I didn't have to pay a quarter of a dollar to Homily.

Q. Who did you pay it to?

A. That is another question.

By the COURT.—You will have to answer it.

A. I don't know as I paid any money to anybody.

Q. You spoke as though you paid some money to somebody—who did you pay it to? You spoke of not paying it to him.

A. I don't know as I paid any money to anybody.

Q. Did you pay any money to be recognized in the tribe? A. No, sir.

Q. Did you pay any money for any purpose?

A. No, sir.

Q. Did you pay any money to anybody?

A. No, sir; not that I know of.

Q. What did you pay the money for?

A. I didn't pay any money.

Q. Why did you say that was another question?

A. I might have given somebody else—some white man some money; I didn't give it in regard to proving my right. I might have given it to him as a present for all I care.

estimony of Edward Brisbo.)

Q. Did Smith do the same thing?

A. I don't know whether he did or not.

Q. You say you didn't pay any money directly to Homily—did you understand the money you paid was to go to him?

A. No, sir; he never mentioned any money to me; I was a nephew to him.

Q. You were not on the original roll, were you?

A. No, sir; because I was one year too late.

Q. Was you here when the roll was made up?

A. No, sir; I came in the fall, a little too late.

Q. When was this meeting held that you refer to?

A. I believe it was in 1890.

Q. That was the first time Homily or the Indians recognized Mrs. Smith?

A. As far as I know, yes, sir. They held another meeting before that I know nothing of.

Q. Are you a full-blood Indian?

A. No, sir; I am a half-breed; my mother is full-blooded Indian and father is a Canadian French.

Q. You don't know whether Mrs. Smith is or not?

A. No, sir; I do not.

The plaintiff, by her counsel, here moves the referee to adjourn this hearing until to-morrow morning at ten o'clock, or at some other different time in the future, for the purpose of taking the testimony of Peter Kittsou, a material witness on behalf of the plaintiff, which witness the plaintiff states will testify, if permitted, to the following facts: That he is acquainted with the plaintiff,

(Testimony of Charles Choliou.)

and has known her since childhood, and knew her mother, and knows that her mother was a full-blooded Indian woman, and a member of the Walla Walla band of Indians, and resided at or near Wallula, now in the State of Washington. That this witness was not known to the counsel as being a material witness until this cause was called, and he resides about twelve or fifteen miles from this place, and cannot be produced here before ten o'clock on to-morrow morning, and at that time, if the hearing is postponed for that time, he can and will be produced by the plaintiff as a witness in her behalf and will testify to the facts as stated above.

Counsel for the Government decline to admit that the witness will testify as indicated by counsel, and decline to agree to a continuance of the cause.

The motion for continuance was then overruled by the special examiner.

Plaintiff's counsel then stated that he rested his case in chief.

Counsel on behalf of the Government moves the Court for an order dismissing the plaintiff's bill as being without equity, and the plaintiff having established no cause of suit by the testimony against the defendant. The special examiner declines to pass up the last-named motion.

Whereupon the defendant's counsel called CHARLES CHOLIOU as a witness, who being first duly sworn, testified as follows:

Direct Examination.

(By Mr. HALL.)

Q. Where do you live?

(Testimony of Charles Choliou.)

A. On the reservation.

Q. How long have you lived there?

A. About thirteen years.

Q. Are you married to an Indian woman?

A. A mixed blood; half-breed.

Q. And an allottee? A. Yes, sir.

Q. Where were you born?

A. In the Willamette Valley.

Q. How old are you?

A. Fifty-four years old. About three miles from St. Paul, Marion county.

Q. State whether or not you knew Mrs. Smith there, the plaintiff in this case. A. Yes, sir.

Q. For how long have you known her?

A. A good many years; we resided close together; about three miles apart.

Q. From your earliest recollection you can't remember when she came there? A. No, sir.

Q. Do you know whether or not she was born there?

A. No, sir.

Q. You never learned that?

A. No, sir.

Q. You knew her mother? A. Yes, sir.

Q. What was her mother?

A. Supposed to be an Indian woman.

Q. Half or full blood?

A. She appeared to be a full-blooded Indian.

Q. What language did she speak?

A. German and French part of the time.

Q. She could talk French? A. Yes, sir.

(Testimony of Charles Choliou.)

Q. You saw Sofia, her husband?

A. I just remember him.

Q. Do you remember of her marrying him or not?

A. I don't know that they were married, but I heard they were married.

Q. How far back can you remember her—what is your earliest recollection?

A. I must have been nine or ten years old when I remember these people; that would be in about 1855 or 1856. Somewheres along in there.

Q. If she had any other father except Sofia you never knew him?

A. I heard she had another father by the name of "Tom."

Q. Do you know how long Tom lived in that neighborhood?

A. No, sir; I don't know; I didn't know him.

Q. I will ask you whether or not you know anything about the roll of the Indians for allotment being made up on the Umatilla Reservation.

A. I know something about it.

Q. Tell the Court what you remember as to how that was done; how they got the names to be allotted.

(Objected to by plaintiff's counsel as incompetent, immaterial, and irrelevant. Objection overruled by the special examiner.)

A. They called a meeting there for all those interested in relation to these three tribes.

Q. What three tribes?

(Testimony of Charles Choliou.)

A. Walla Walla, Cayuse, and Umatillas.

Q. What was done at the meeting?

A. We had to prove whether we belonged here or not before they took the names.

Q. What was done there as to making up the roll as to full-bloods or half-bloods that were entitled to an allotment, making up the lists?

(Objected to by plaintiff's counsel as incompetent, immaterial, and irrelevant. Objection overruled. Tell what was done.)

A. We had to be either Walla Walla, Cayuse, or Umatillas. They called them all in and put their names on the list to see how many there were that was entitled to land.

Q. State whether or not the object of that meeting was to find out every person who was entitled to an allotment and report it up to the commissioners.

(Same objection by the plaintiff's counsel. Same ruling by the Court.)

A. Because they didn't want everybody to come in who had mixed blood in them and take up the land.

Q. What was the object—to get all the people in who were entitled to land? A. Yes, sir.

Q. Are you acquainted with this southeast quarter of section 20, township 3 north, of range 34 east of the Willamette meridian, that Hy-yu-tse-mil-kin claims, the plaintiff in this case? A. Yes, sir.

Q. Do you know anything about the improvements that were put on there by Smith?

(Testimony of Charles Choliou.)

A. Not particularly, but I saw the improvements on the place.

Q. Describe them.

A. There are two log barns and a little log cabin and a well, and a fence around the quarter section.

Q. Was the fence around that quarter section or the large tract of land that would also enclose them?

A. Around that quarter section.

Q. How much land did Smith have fenced up there?

A. I could not say.

Q. More than six hundred and forty acres?

A. I don't think he did.

Q. Did he have any other land fenced up there besides what he claimed as an allotment for himself and children? A. I don't think he did.

Q. How much is the value of those improvements, this little log barn and the granary and well?

A. That is pretty hard to tell.

Q. How much would it cost to build them? You are a pretty practical man?

A. I was called in by Harper to help appraise the property; when I got there there was nothing more said about it, and I quit them.

Q. Who was along at that time?

A. Mr. Brisbo and the clerk, John Gyer.

Q. And Harper and Smith?

A. Yes, sir.

Q. What did they do?

A. That is more than I could say.

(Testimony of Charles Choliou.)

Q. What did you do?

A. Not much of anything; they went inside and I stood out of doors.

Q. When they came out what was said?

A. They were wondering what it cost to bring them logs off the mountain. They never asked me any more questions about it, so I had nothing to say.

Q. Did you make up your mind what it was worth?

A. No, sir.

Q. Could you say at this time what it would be worth —a fair price?

A. It is a pretty hard thing to do.

Q. Give your judgment.

A. About $75 for each one.

Q. The two buildings $150? A. Yes, sir.

Q. What are cedar posts worth there?

A. The posts they used were worth about $5 per hundred. That is what I paid for posts.

Q. What do you say the well was worth—do you know who dug that?

A. I know just what I heard; I never see anyone working there at the well myself.

Q. What would you say it was worth—what would it cost to put a well down like it?

A. It depends altogether on what kind of ground you get in. Sometimes it costs a whole lot. Mine cost $4 per foot.

Q. This well is forty-seven feet deep, I believe—what would you say it was worth per foot?

A. I would say $4 per foot.

(Testimony of Albert Minthorn.)

By the COURT.—Is your well through rock?

A. Yes, sir, about the same kind of rock.

ALBERT MINTHORN, called as a witness on the part of the defendant being first duly sworn, testified as follows:

Direct Examination.

(By Mr. HALL.)

Q. You are a Walla Walla Indian? A. Cayuse.

Q. You are living as an allottee upon the reservation?

A. Yes, sir.

Q. How long have you lived here?

A. All my life except when I went out of the State to school back east.

Q. Do you know how old you are?

A. Yes, sir; thirty-one years.

Q. Do you know Hy-yu-tse-mil-kin?

A. Yes, sir.

Q. And Mr. Smith?

A. Yes, sir; for the last few years.

Q. Do you know anything about this land that Hy-yu-tse-mil-kin claims? A. Yes, sir.

Q. Do you know anything about the improvements there?

A. Hardly; I only passed there one time; that is all.

Q. Do you know anything about what they are worth?

A. I noticed she had a house and shed and a little cabin; I just glanced at it, that is all, from the road.

Q. Was you present to know anything about when Hy-yu-tse-mil-kin was allotted? A. Yes, sir.

(Testimony of Albert Minthorn.)

Q. How much was there?

A. The strip would be about three sections.

Q. Something like one thousand eight hundred acres; did they have it fenced?

A. No, sir; only this side of Adams; they run a furrow around three sections and enclosed it that way.

Q. This was before the allotment? A. Yes, sir.

Q. When the commissioners came to allot the land they allotted Hy-yu-tse-mil-kin inside of that furrow?

A. Yes, sir.

Q. You were acting as interpreter?

A. Yes, sir.

Q. Did anyone go before them at that time and claim it?

A. No, sir; not before any of them Indian men were there.

Cross-Examination.

(By Mr. SLATER.)

Q. Did you run that furrow?

A. No, sir; I did not.

Q. Did you see it run?

A. Yes, sir; I saw it after it was done.

Q. You didn't see it done? A. No, sir.

Q. How do you know who did it?

A. Because they told me.

(Plaintiff's counsel moves the Court to strike out the testimony of the witness in regard to the furrow as hearsay.)

(Testimony of Albert Minthorn.)

By the COURT.—Who told you?

Q. Smith didn't tell you? A. No, sir.

Q. Do you know whether or not Smith was claiming this land inside of this furrow?

A. Yes, sir; it was inside of that.

Q. Was there buildings inside of that; the house and things—were they inside of the furrow?

A. I think it was.

By the COURT.—The motion, so far as it relates that Smith run the furrow, is allowed. So far as it shows the furrow was there and that Mrs. Smith and her family claimed the land inside of it, is allowed to stand, and overruled.

(Motion is withdrawn by plaintiff's counsel.)

Q. Were you present when Hy-yu-tse-mil-kin selected with the allotting commissioners this land?

A. Yes, sir.

Q. Were you the interpreter for the allotting commissioners? A. No, sir.

Q. You don't know whether anybody made application for this land prior to that time?

A. Mr. Smith and family made application for the land but the Indians would not acknowledge them.

Q. Was that the reason Smith and family left the ground because the Indians would not recognize them at that time? A. Yes, sir.

Q. How do you know they didn't recognize them?

A. Because we had a council with them there at the agency.

(Testimony of Albert Minthorn.)

Q. Do you know what recognition they gave them before that?

A. His wife claimed she was a Walla Walla Indian.

Redirect Examination.

Q. You say they had a council at the time the allotting was made and they refused to allot her?

A. Yes, sir.

Recross-Examination.

Q. Didn't they recognize her rights at a later council, in 1887?

A. Yes, sir. They didn't recognize her at that time; I was interpreter with the other boys; we was listening as interpreters; it was not passed upon at that time.

Q. Were you there all the time? A. Yes, sir.

Q. Knew everything that took place? A. Yes, sir.

Q. Knew everything about it? A. Yes, sir.

HY-YU-TSE-MIL-KIN, the defendant, called and sworn as a witness, testified as follows—by Minthorn, interpreter.

Direct Examination.

(By Mr. HALL.)

Q. Where do you live? A. Up the river.

Q. On the Umatilla Reservation?

A. Yes, sir.

Q. What tribe of Indians do you belong to?

A. Cayuse.

Q. How long have you lived on the reservation?

A. Ever since he was a boy.

(Testimony of Hy-yu-tse-mil-kin.)

Q. How old are you? A. Forty-five years old.

Q. Do you know Mrs. Smith—Philomme Smith?

A. No, sir.

Q. This woman sitting back here. (Indicating the plaintiff.) A. He says he don't know her.

Q. Were you at the council of the Indians held on the Umatilla Indian Reservation to see what Indians were entitled to allotment? A. Yes, sir.

Q. Was this woman sitting here (Mrs. Philomme Smith) recognized there as an Indian entitled to an allotment on the Umatilla Reservation?

(Objected to by plaintiff's counsel as incompetent, immaterial, and irrelevant and leading. Objection overruled by the Court.)

A. No, sir. This woman was not there; she came after that meeting was held.

Q. Ask him if he was at another meeting held about the time that the allotments were made—another council with the Indians.

A. He was there at the second meeting.

Q. Ask him if Mrs. Smith was recognized as a Walla Walla Indian and entitled to an allotment at that meeting or any other meeting that he knows anything about.

(Objected to by plaintiff's counsel as incompetent, immaterial, and irrelevant, as it does not tend to show that the plaintiff was present. Objection overruled by the Court.)

A. He was at every meeting and he don't recollect of her being there.

(Testimony of Hy-yu-tse-mil-kin.)

Q. Was she ever recognized as a member of the tribe?

A. No, sir.

Q. Were you allotted some land that this man Smith had fenced up in the southeast quarter of section 20?

A. He says he was allotted land up there by the commissioners.

Q. Ask him what, if anything, was on the land, such as houses, barns, etc.

A. He says there were no improvements there.

Q. Ask him if there wasn't a cabin there of some kind.

A. No, sir.

Q. What became of them?

A. There was no house or cabin at the time of the allotment.

Q. Was there any log barn there?

A. There was nothing around there at all.

Q. Who selected this land?

A. He did; this man did; one hundred and sixty acres.

Q. Did you ever build any barn—log barn on there?

A. No, sir.

Q. Isn't there any on it now?

A. There is a stable there now.

Q. Who built it? A. He don't know.

Q. How much is it worth? A. He can't tell.

Q. How much would he sell it for? Ask him if there wasn't a two-wire fence around the land.

A. No, sir; no fence there.

Q. Did you ever pay any money to anybody for any of these improvements, that stable or well or any improvements on there?

(Testimony of Hy-yu-tse-mil-kin.)

(Objected to as incompetent, immaterial, and irrelevant unless the question is confined to the plaintiff. Objection sustained.)

Q. Did you ever pay any money for these improvements?

(Same objection. Objection overruled.)

A. No, sir.

Cross-Examination.

(By Mr. SLATER.)

Q. Who told you to go and take this land?

A. The allotting commissioners.

Q. Did anybody else tell you to go and take this land before you went to the allotting commissioners?

A. No, sir; nobody told him.

Q. Did you have another piece of land which you claimed for your land before you selected this?

(Objected to by defendant's counsel as incompetent and immaterial. Objection overruled.)

A. No, sir.

Q. Did Mrs. Smith ever have this land that you are claiming under your allotment in her possession?

A. No, sir.

Q. Do you know Gus Russie? A. No, sir.

Q. You don't know Gus Russie? They call him Yusta.

A. Yes, sir.

Q. Ask him if he didn't go with Yusta to this land and break the fence that was around it.

A. He says Yusta told him he would rent the land.

Q. Ask him if he didn't go with Yusta to the land and break the fence? A. No, sir.

CHARLES WILKINS, called as a witness for the defendant, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. HALL.)

Q. You are at present the United States Indian agent for the Umatilla Indian Reservation?

A. Yes, sir.

Q. Do you know Philomme Smith and family?

A. I know Mr. Smith and Mrs. Smith by sight—I have met them, yes, sir.

Q. I ask you whether or not they are allotted upon the reservation—Mrs. Smith.

A. Yes, sir; Mrs. Smith is.

Q. What, if any, disposition in the way of renting or otherwise has she made on her land?

A. She has leased a portion of it.

(Objected to by plaintiff's counsel as not the best evidence. Objection overruled.)

Q. What has been their custom since you have been there as to renting it or otherwise from year to year?

A. I have rented it for Mrs. Smith; I made the last lease on it; previous to that time I don't know.

Q. To whom is the lease money paid?

A. It was paid to me.

Q. For whose use and benefit?

A. For Mrs. Smith.

Q. What is the fact as to whether or not she has accepted it from time to time?

A. She came with Mr. Smith, I believe, and accepted it.

(Testimony of Charles Wilkins.)

By Mr. HALL.—Counsel on behalf of the Government offers in evidence in support of the issues maintained by defendant a certified copy of United States Indian Agent Harper's report, dated August 17th, 1894, pertaining to improvements made by Philomme Smith on the south-east quarter of section 20, township 3, range 34 east. Umatilla Indian Reservation; also a list of the allotments made to her and her children thereon by United States Indian Agent Wilkins on November 24th, 1899, the same being duly certified to by W. A. Jones, Commissioner of Indian Affairs, Washington, D. C.

(Objected to by plaintiff's counsel as incompetent, immaterial, and irrelevant, and especially to that part of it applying to the allotments from Philomme Smith and her children, for the reason that the same does not show that said allotments were made upon the selection of Philomme Smith. Objection overruled.)

Q. You did not allot these lands?

A. No, sir; I didn't make the selections.

Q. They were by your predecessor?

A. Yes, sir.

Q. I ask you whether or not Mrs. Smith has been exercising control over these lands during the incumbency of your office. A. Yes, sir; she has.

Cross-Examination.

(By Mr. SLATER.)

Q. You say she has been exercising control; what do you mean?

A. She leased the land to Mr. Snyder.

(Testimony of Charles Wilkins.)

Q. Has she ever had possession?

A. I suppose so; it was allotted to her and she leased it to Mr. Snyder. If I mistake not she told me she had received the money for the lands but had not received enough, previous to my making this lease.

Q. That is all, unless you know something else which you would like to state.

A. I know Mrs. Smith made the selections, or rather Mr. Smith made the selections and changed from one place to another.

Cross-Examination.

(By Mr. SLATER.)

Q. You don't know that of your own personal knowledge? A. No, sir.

(Plaintiff moves to strike out that part of the testimony. Motion allowed by the Court.)

Defendant's counsel here states that he rests his case.

PHILOMME SMITH, the plaintiff, recalled in rebuttal, testified—By Mr. Brisbo, interpreter as before.

Direct Examination.

(By Mr. SLATER.)

Q. Did you ever select any other land upon the reservation for your allotment?

A. No, sir; she never selected any for herself.

Cross-Examination.

(By Mr. HALL.)

Q. How did you get this land you are renting to Snyder?

(Testimony of Philomme Smith.)

A. The old man must have done it; she knows nothing about it.

Q. Who do you mean by old man?

A. Mr. Smith.

Q. Did Mr. Smith have any right to make any selection for you?

(Objected to by plaintiff's counsel as incompetent, immaterial, and irrelevant. Objection overruled by the Court.)

A. She never authorized him to do it.

Q. You rented the land and accepted the money, though?

A. Yes, sir; she went there and got the money on it.

Q. You signed the lease, too, didn't you?

A. Yes, sir; she signed the lease all right.

Q. You knew what you were signing?

A. She said she didn't know very much what she signed, but she signed it all the same.

Q. You knew you were leasing this land, this new allotment, didn't you? A. Yes, sir.

Q. You knew how much an acre you were getting for it?

A. She says she didn't know how much an acre.

Q. Who did make the bargain?

A. Old man Smith.

Q. Ask her if she didn't get the money.

A. She drew the money once herself.

(Testimony of Philomme Smith.)

Redirect Examination.

Q. Ask her if she knew she was giving up or intended to give up her first land.

A. No, sir; she had no intention of dropping it. She didn't intend to let it go.

Plaintiff here rested her case.

State of Oregon,
County of Umatilla. } ss.

I, J. S. Beckwith, being first duly sworn, say: That I took the foregoing testimony down in shorthand at the trial of said cause, and afterwards transcribed the same into typewriting, and that the foregoing pages of typewriting contain a full, true, and correct transcript of the testimony so taken, and all the testimony given at the trial thereof.

J. S. BECKWITH.

Subscribed and sworn to before me this 28th day of August, 1900.

[Seal] CHAS. H. CARTER,
Notary Public for Oregon.

Filed September 10, 1900. J. A. Sladen, Clerk.

Plaintiff's Exhibit "A."

DEPARTMENT OF THE INTERIOR.

C. F. L.

Office of Indian Affairs.

Washington, October 2, 1896.

I, D. M. Browning, Commissioner of Indian Affairs, do

hereby certify that the papers hereto attached are true copies of the originals as the same appear on file and of record in this office.

In testimony whereof, I have hereunto subscribed my name, and caused the seal of this office to be affixed, on the day and year first above written.

[Seal] D. M. BROWNING,
Commissioner.

E. E. W.

DEPARTMENT OF THE INTERIOR.

Washington, September 24, 1896.

The Commissioner of Indian Affairs.

Sir: Referring to Department letter of the 20th of last July, in the matter of the application of Mrs. Philomme Smith and others and Mrs. Louisa Morrisette and others for the allotment of certain land in the Umatilla Reservation, Oregon, which had been allotted to other parties, directing an investigation by your office of the dates when the allottees acquired their alleged right to take the particular tracts of land allotted to them, the value of any improvements made thereon by them, and the dates thereof, etc., and to your report of the investigation made, dated the 19th instant, I now transmit, for your information an opinion of the Assistant Attorney General for the Department, dated August 6th last, favorable to the applicants, which has received the approval of the secretary.

He suggests, however, in view of the fact that the showing by the applicants is an ex parte one, that the allottees be called upon to show cause why the allotments should

not be canceled and the petitioners allowed to have allotment of the tracts, as their various interests appear.

In accordance with the foregoing suggestion, you will notify the allottees in question, and cite them before your office to show cause why the allotments made to them should not be canceled and the same lands allotted to the petitioners, according to their various interests, giving the allottees ample time to prepare their cases.

All the papers in the case are transmitted for file in your office.

Very respectfully,

WM. H. SIMS,
Acting Secretary.

6130 Ind. Div. '95. 1 pkg. papers.

DEPARTMENT OF THE INTERIOR.
Office of the Assistant Attorney General.
Washington, August 6, 1896.

The Honorable, The Secretary of the Interior.

Sir: I am in receipt of your communication of July 20, 1896, asking for an expression of opinion in the matter of the applications of Philomme Smith et al. and Louisa Marsette or Morisette et al. for allotments in the Umatilla Reservation.

An examination of the records shows that on July 1, 1893, my predecessor delivered an opinion upon the rights of these parties in which he held that they were not so entitled. The question being reviewed by him on June 28, 1895, he rendered an opinion in which he recommended that the opinion theretofore rendered by him should not be followed, and that the applicants in the case were entitled to such allotments.

In a letter of the Honorable Commissioner of the Indian Office of October 30, 1895, the lands involved, with their present condition, are set out to be as follows:

That Mrs. Philomme Smith claims for herself the S. E. ¼ of Sec. 20, T. 3 N., R. 34 E., Oregon; that this tract was allotted to Hy-yu-tse-mil-kin, which allotment was approved by the Department, April 12, 1893, and leased by the approval of the Department for two years from March 1, 1894.

The NE. ¼ of the NE. ¼ of Sec. 29, of said township and range is claimed for Charles Smith, minor child of Mrs. Smith; the NW. ¼ of the NE. ¼ of said section, township and range is claimed for Maggie Smith, minor child of Mrs. Smith; the SE. ¼ of the NE. ¼ of said section, township and range is claimed for Jennie Smith, minor child of said Mrs. Smith; the SW. ¼ of the NE. ¼ of said section, township and range is claimed for Lura Smith, minor child of said Mrs. Smith. All these lands have been allotted to Martha Hebeart, a Walla Walla Indian, and the allotment was approved on April 12, 1893.

The NE. ¼ of the NW. ¼ of Sec. 29, of said township and range, is claimed for George Smith, minor child of Mrs. Smith; the SE. ¼ of the NE. ¼ of said section, township and range is claimed for Soffa Smith, minor child of said Mrs. Smith; and the W. ½ of the NW. ¼ of said section, township and range is claimed for James Smith, over eighteen years of age, son of Mrs. Smith. These lands have been allotted to Margaret Bourner, a Walla Walla Indian, and the allotment was approved by the Department April 12, 1893. They were leased for two

years from November 1, 1894, and the lease was approved by the Department.

The W. ½ of the SE. ¼ of Sec. 29, said township and range, is claimed for William Smith, over eighteen years of age, son of Mrs. Smith; the NW. ¼ of said SE. ¼ has been allotted to Mary B. Guyott, minor child of Mary Guyott, and the SW. ¼ of the SE. ¼ has been allotted to Carrie Chalifoe, minor child of Julia Ann Chalifoe. The NW. ¼ of the SE. ¼ above mentioned has been leased for a period of three years from March 1, 1894, and approved by the Department.

Mrs. Morisette, now dead, claims for herself the NE. ¼ of Sec. 14, T. 3 N., R. 3 E. This tract has been allotted to Charles McWhirk, and the allotment was approved by the Department April 12, 1893; the E. ½ of the SE. ¼ of Sec. 29, and the E ½ of the NE. ¼ of Sec. 32, said township and range, is claimed for Mrs. Mary Pecar, over eighteen years of age, a daughter of Mrs. Morisette. These lands were allotted to Mary Guyott and the allotment approved by the Department April 12, 1893. They have been leased for a period of three years, beginning March 1, 1894, and the lease approved by the Department.

The SW. ¼ of the NE. ¼ of Sec. 32, said township and range, is claimed for Ang Meshee, minor child of Mrs. Mary Pecar, and grand-daughter of Mrs. Morisette; the NW. ¼ of the NE. ¼ of said section 32, said township and range, is claimed for John Meshee, minor child of Mrs. Mary Pecar. These lands were allotted to Louis Chalifoe and the allotment approved by the Department April 12, 1893.

The questions for disposition are: (1) Are these par-

ties, the applicants here, entitled to allotment in the Umatilla Reservation (diminished)?; (2) Are they entitled to the tracts which they have applied for, and, as a corollary of this proposition, has the Department authority to cancel the allotments heretofore made and make new allotments for the various tracts involved by the petition?

The allotment act of March 3, 1885 (23 Stats. 340), provides: That the President of the United States cause lands to be allotted to the confederated bands of Cayuse, Walla Walla, and Umatilla Indians, residing upon the Umatilla Reservation, in the State of Oregon.

Said act also provides that: Before any allotments are made, a commission of three disinterested persons to be appointed by the President shall go upon said reservation and ascertain as near as may be the number of Indians who will remain on said reservation, and who shall be entitled to take lands in severalty thereon. * * * * Said commission shall report to the Secretary of the Interior the number and classes of persons entitled to allotments, as near as they may be able to.

And it appears further that the manner of making allotments was to be as follows: Allotments to heads of families and to children under eighteen years of age belonging to families shall be made upon the selections made by the head of the family.

By the act of June 9, 1855 (12 Stats. 945), which was a treaty between these bands of Indians and the Federal Government, in which these confederated tribes ceded all of their rights to the large area of country occupied by

them and took in lieu thereof a reservation set aside exclusively for their use, it was provided:

The said tribes and bands agree to remove to and settle upon the same (the permanent reservation) within one year after the ratification of this treaty, without any additional expense to the Government other than is provided by this treaty, and until the expiration of the time specified the said bands shall be permitted to occupy and reside upon the tracts now possessed by them.

Under the authority of this act and the opening paragraph of the act of 1885 (supra), my predecessor, in his first opinion, held that it was the intent of Congress in the act of 1885, the one now under consideration, to provide for allotments for only those who resided upon the permanent Umatilla reservation. Subsequently, in his opinion rendered on June 28, 1895, he concluded that he had attached too much importance to the opening paragraph of the act of 1885, and that while it was agreed in the treaty of 1855 that the Indians should remove within one year to the permanent reservation, that there was no penalty affixed to its violation, and that a failure to so remove and reside would not work a forfeiture of their tribal rights.

It is in evidence that Mrs. Smith and Mrs. Morisette are full-blooded Indians, their mother having been a Walla Walla, who married an Iroquois. They were not residing upon this reservation at the time that the act of 1885 became operative, nor, for that matter, were the majority of Indians belonging to these confederated tribes. It is shown by the record that when the agents of the Government went on this reservation they found

but few Indians actually residing there, and it was only after two weeks of sending out of runners and the using of all the means at their disposal that they succeeded in securing an attendance of a majority of the male adults of these tribes. This was in itself a recognition by the Department that residence upon the reservation was not essential to tribal recognition.

In the treaty of 1855 it was provided that so much of the territory of these Indians within the States of Oregon and Washington in which they had been accustomed to roam over, hunt, fish and pasture their stock, as was not settled upon or claimed for individual use by citizens of the United States, should be, in common with such citizens, at the disposal of these Indians, and in accordance with such right so granted these petitioners, with their husbands, who are white men, moved off of the permanent reservation and upon the land to which they had a common right of usage with others. The trouble with these claimants seems to have arisen out of their failure to be upon the reservation when the census roll of the tribe was made up. They arrived at said reservation, in reply to the communication sent to them by one of the Indians, the day after the census takers had left the reservation, to wit, on the 7th day of June, 1887; or rather Mrs. Morisette arrived upon that day and Mrs. Smith shortly thereafter. They were recognized by Homily, chief of the Walla Wallas, and various other head men and members of the confederated tribes, and the Indian agent then in charge assigned each one of them to a parcel of land, after selection, and they have made valuable improvements on and have continued to reside thereon,

as far as this record shows, ever since—the value of their improvements amounting to a considerable sum. They began residence upon the land about the middle of June, and their reasons for not having arrived sooner was that they lived some two hundred miles away and were without money to make the trip.

It appears from the record, further, that a council was held about 1890 in which their right to allotments was recognized. About a year thereafter such right was denied. My conclusions are that the action of the council in recognizing or in refusing to recognize these applicants can be of no weight. They were either members of the confederated tribes, in this instance Walla Walla, or they were not. The right of determining this question, under the wording of the statute, it is clear, resides with the Secretary of the Interior. The fact that they did not reside on the reservation is likewise immaterial, in view of the property right granted them under the treaty of 1855, of occupancy in common with others of any of the lands theretofore occupied by them that were not claimed by private individuals.

It appears, further, that inheritance among these Indians is through the mother and not through the father, and that the true test in these cases is to ascertain whether parties claiming to be Indians and entitled to allotments have by their conduct expatriated themselves or changed their citizenship. In this connection it is proper to state, in view of what the record shows, that *they never been outside* of the hunting and fishing grounds of their tribe, and that their conduct in failing

to stay upon this reservation cannot be construed as working a forfeiture of their rights, inasmuch as a large percentage of allottees upon this reservation resided, as did these petitioners, elsewhere than upon the reservation. I am, therefore, of the opinion that they are entitled to such allotments.

In reference to the question whether they are entitled to the tracts selected by them, in view of the allotments heretofore made, it appears proper to state that they, in the showing made in this record, which is an ex parte showing, outside of an official record, in accordance with the language of the statute (supra) selected these tracts of land with the consent of and notice to the head chief of the tribe and the then Indian agent, and went into peaceable possession of them, and have placed valuable improvements thereon; and that the allottees received allotments of these lands with knowledge of these facts. Nor can it be said that the first opinion of my predecessor, which was approved by you, was in anywise the cause of the making of such allotments, inasmuch as it appears from the record that they were made on April 12, 1893, and the opinion in question was not rendered until July 1, 1893.

If this showing is to be the only one, I am of opinion that they are entitled to the tracts applied for by them. But I would suggest, in view of the fact, that the showing is an ex parte one, that the allottee be called upon to show cause why the allotments should not be canceled

and these petitioners allowed to have allotments of these tracts as their various interests appear.

All of which is respectfully submitted.

WM. A. LITTLE,
Assistant Attorney General.

Approved:
HOKE SMITH,
Secretary.

Filed September 10, 1900. J. A. Sladen, Clerk.

Defendant's Exhibit No. 1.

DEPARTMENT OF THE INTERIOR,
C. F. L.
Office of Indian Affairs.
Washington, April 11, 1900.

I, W. A. Jones, Commissioner of Indian Affairs, do hereby certify that the papers hereto attached are true and literal copies of so much of the originals to which they relate, viz: That part of United States Indian Agent Harper's report dated August 17, 1894, pertaining to improvements made by Philomme Smith on SE. ¼, Sec. 20, T. 3 N., R. 34 E., Umatilla Indian Reservation, Oregon, and schedule of allotments made to her and her children thereon, by United States Indian Agent Wilkins on November 24, 1899, transmitted to this office by his letter of November 25, 1899, as the same appears on file in this office.

In testimony whereof, I have hereunto subscribed my name, and caused the seal of this office to be affixed, on the day and year first above written.

[Seal, Office of Indian Affairs] W. A. JONES,
Commissioner,
N. C. T.

UNITED STATES INDIAN SERVICE.

Land.

48,162-1893.

Umatilla Agency, August 17, 1894.

Honorable Commissioner of Indian Affairs, Washington, D. C.

Sir: In reply to your letter of January 19, 1894, reference above, I have the honor to submit the following:

I visited the lands alleged to have been improved and claimed by Mrs. Philomen Smith and Mrs. Louise Morrisette, respectively, and secured all the evidence obtainable, which can be summarized as follows:

The lands claimed by Mrs. Philomen Smith for herself and family: SE. ¼ Sec. 20, T. 3 N., R. 34 E., upon this land she constructed, or had constructed, one and one-half miles of fencing, granary, barn and a well dug. The present value of these improvements do not exceed $225.00. No crop has been raised on this land, but has been used one year by Mrs. Smith for depasturing her stock.

Allotted to Hy-yu-tse-mil-kin.

* * * * * * * *

Respectfully,

GEORGE W. HARPER,

United States Indian Agent.

Walla Walla.

No. of Allotment.	Name of Allottee. Indian.	English.	Male	Female	Age	Subdivision.	Section	Town.	Range	Acres	100ths	Remarks
462	Phi-lo-mene	Smith		F	53	Lots 13 and 14, Sec. 36, Tp. 3 N., R. 33 Lot 3 of Sec. 5, Tp. 2 and S. W. ¼ of N. W. ¼	33	3	34	146	20	Head
463		James Smith	M		26	N. E. ¼ of S. W. ¼ and N. W. ¼ of S. E. ¼	25	2	33	80		Son
464		Charles "	"		10	N. W. ¼ of S. W. ¼	33	3	34	40		"
465		Jane "		F	12	Lot No. 1	32	3	34	38	10	Daughter.
466		Maggie "		"	16	S. E. ¼ of N. E. ¼	5	2	34	40		"
467		Laura "		"	7	S. E. ¼ of N. W. ¼	5	2	34	40		"

Umatilla Agency, Oregon, Nov. 24, '99.

I, the undersigned do hereby certify, on honor, that the above is a true schedule of allotments as made by me under authority from the United States Commissioner.

CHARLES WILKINS,
United States Indian Agent.

Filed September 10, 1900. J. A. Sladen, Clerk, United States Circuit Court, District of Oregon.

And afterwards, to wit, on the 1st day of March, 1901, there was duly filed in said court testimony taken before Charles H. Carter, special examiner, accompanying supplemental findings, in words and figures as follows, to wit:

In the Circuit Court of the United States for the District of Oregon.

PHILOMME SMITH, Plaintiff,

vs.

HY-YU-TSE-MIL-KIN, Defendant

Testimony Accompanying Supplemental Findings.

Testimony of Susanne Gagnon, and others, taken before Chas. H. Carter, special examiner in the above suit, at his office, at 1:30 P. M., on the 19th day of January, 1901, pursuant to notice duly given to the parties to the said suit, through their respective counsel:

At the time and place aforesaid plaintiff appeared in person and by R. J. Slater, Esq., her counsel, and the defendant appearing not; he, however, through the Honorable John H. Hall, District Attorney, having on yesterday, by telegram, requested a postponement of this cause for one week, which request for postponement was denied and is now here again denied; and he was then informed that the examination would take place at this time and place, and he, over the telephone from Portland, Oregon, consented thereto.

SUSANNE GAGNON, a witness on behalf of plaintiff, being first duly sworn, testified as follows, through Mr. Frederick Parr, interpreter, who was also duly sworn, as the law directs.

(By Mr. SLATER.)

Q. Where do you live?

A. About two miles on this side of Spring Hollow.

Q. On the Umatilla Reservation? A. Yes, sir.

Q. How long have you lived on the Umatilla Indian Reservation?

A. Since they moved us here, since they moved the Indians here.

Q. Are you a full-blood Indian woman?

A. Yes, I am a full-blooded Indian.

Q. To what tribe of Indians do you belong?

A. The old Wallula Indians, the Walla Wallas.

Q. How long have you lived in this country?

A. I don't know exactly; we never keep track of our age. I am about sixty years old.

Q. Have you lived in this country all your life?

A. Yes, just from Wallula to Walla Walla and here.

Q. Do you know Mrs. Philomme Smith?

A. If that is the Mrs. Smith, yes.

Q. How long have you known her?

A I knowed her at the time that that doctor was killed, Dr. Whitman was killed.

Q. Where was she (Mrs. Smith) then?

A. Over there at Walla Walla.

Q. Did you know Mrs. Smith's mother?

A. Yes, she was there with her mother.

(Testimony of Susanne Gagnon.)

Q. Was her mother an Indian woman?

A. Yes, she was a full-blood Indian.

Q. Of what tribe or tribes did she belong?

A. Wallula or Walla Walla.

Q. Did you know Mrs. Smith and her mother before that doctor was killed?

A. I knowed of them, but I had not seen them at that time; they were down below; her grandmother used to tell me about her father, her mother's father.

Q. Did you know Mrs. Smith's father? A. Yes.

Q. Was he a white man or an Indian?

A. He was an Indian from another tribe—from the Black Feet.

Q. How old were you when the doctor was killed?

A. In the neighborhood of nineteen years old.

Q. How old was Mrs. Smith when you saw her at Wallula after that?

A. She was small, just about that size (indicating about three feet).

Q. Did you know any of Mrs. Smith's brothers and sisters?

A. Yes, she had a sister about so high (indicates); then she had one—and a little brother that was younger than her.

(By Mr. CARTER.)

Q. What was Mrs. Smith's mother's name?

A. Don't remember what her name was. I was pretty small when they left and I don't recollect.

Q. What was Mrs. Smith's father's name?

(Testimony of Philomme Smith.)

A. Thomas.

Q. Was he a Blackfoot or an Iroquois?

A. Iroquois.

Q. None of these other tribes that she names?

A. No.

Mrs. PHILOMME SMITH, the plaintiff, having been heretofore duly sworn in this cause, testifies as follows:

(By Mr. SLATER.)

Q. Mrs. Smith, it has been shown by the defense that you have been allotted another piece of land; do you intend to hold both pieces of land?

A. No, I want the first one I took.

Q. When you selected, or had this second piece selected for you, did you intend to give up your claim to the other land that you had selected?

A. No, I didn't want to give it up if I could keep my first piece.

Mr. F. A. SMITH, the husband of the plaintiff, having been heretofore duly sworn, is again called as witness in plaintiff's behalf, and testifies as follows:

(By Mr. SLATER.)

Q. Mr. Smith, when you and your wife were called upon by the agent, Mr. G. W. Harper, to give up the land that your wife had selected, and to select another piece of land, state what, if any, conversation you had with the agent about that.

A. I went to the agent a couple of days after—a few days afterward, any way, and I asked him if it would

(Testimony of Mr. F. A. Smith.)

have any effect on our fighting this cause if we had to take other lands, and he said he didn't think it would; he thought we could go on and fight this case just the same and select some other piece of land. I told him we could select other land, but I would fight this piece as long as there is any land there.

Q. State, as near as you can, when it was that you enclosed this land that your wife is claiming with a fence.

A. I think it was—I am positive in the spring of 1890.

Q. What kind of fence was it?

A. Two-wire fence. In 1889 I put the barn on there and in the spring of 1890 I put the fence there.

(By Mr. CARTER.)

Q. You have mentioned having had a conversation with the agent about selecting other land than the piece in question; who was present when you had that conversation, besides yourself and the agent?

A. I don't remember; my wife was there, my wife and I both.

Q. Anyone else besides you three?

A. I don't remember now as there was.

Q. Where was it?

A. It was at the agency. He went on and said, "You had better go on and take it; you won't know the difference in a hundred years from now," and I said, "No, I don't suppose I would, but some of my children or their children might."

(Testimony of Mr. F. A. Smith.)

Q. How long was this before you made the second selection?

A. Oh, it was quite a while; in a few days, though, I made the selection of one 40, the one we had a little house built on; there was a little house down there that we built and afterward we found that it was vacant land. We just moved down and lived there.

Q. You had no other place to go, did you?

A. No.

ED BRISBO, being heretofore duly sworn in this cause, was again called as a witness in plaintiff's behalf, and testified as follows:

(By Mr. SLATER.)

Q. Mr. Brisbo, you are acquainted with the land that Mrs. Smith is claiming and trying to get in this cause, are you not?

A. Yes, I guess I ought to be by this time.

Q. Were you acquainted with it at the time that the allotments were made? A. Yes, sir.

Q. Do you know whether it was fenced at that time or not? A. When the allotment was made?

Q. Yes.

A. Well, I don't recollect—yes, come to think of it, we had to break into it.

Q. Who cut through the fence?

A. Some of Gus Russie's men.

Q. Were you present when it was done?

A. Yes, I helped to go in through the fence myself.

(Testimony of Ed Brisbo.)

(By Mr. CARTER.)

Q. Who was there besides yourself and this Gus Russie man?

A. There was a man named Dave Dorian, Boston Murry and Alore, and Rube Wilson and myself; there were five of us.

Q. When was this—after the allotment or before the allotment? A. Just right after the allotment.

Q. Right after the allotment was made to Hy-yu-tse-mil-kin? A. Yes, sir.

Witness excused.

Pursuant to stipulation entered into between counsel for the respective parties above named at a former taking of depositions in this cause, to the effect that the witnesses might sign the stenographer's notes and need not sign the testimony after the same should be transcribed into longhand, the witnesses now here are allowed, each in the presence of the stenographer, to sign the stenographer's notes to their deposition.

In the Circuit Court of the United States for the District of Oregon.

PHILOMME SMITH,
Plaintiff,
vs.
HY-YU-TSE-MIL-KIN,
Defendant.

Certificate of Special Examiner.

United States of America,
District and State of Oregon, } ss.
Umatilla County.

This certifies that the above cause came on for hearing before the undersigned, Chas. H. Carter, special examiner, at his office in the Pendleton Savings Bank Building, in Pendleton, Oregon, at 1:30 P. M. on January 19, 1901, pursuant to notice given to each party and to their respective counsel heretofore, plaintiff being present in person and by R. J. Slater, Esq., her counsel, and defendant not being present.

And thereupon the following witnesses were introduced by plaintiff, duly sworn and gave testimony as shown by the papers attached hereto, to wit: Susanne Gagnon, Philomme Smith, the plaintiff, F. A. Smith, husband of plaintiff, and Ed. Brisbow; thereupon the cause was adjourned until Saturday, January 26, 1901, at the same place, at 10 o'clock in the forenoon, at the request of counsel for defendant, by telegram.

And at 10 o'clock in the forenoon on January 26, 1901, there being present, at the time and place aforesaid, Chas. H. Carter, special examiner, R. J. Slater, counsel for plaintiff, and no other person appearing, the taking of depositions was thereupon declared closed.

That before proceeding to the examination of the witnesses above mentioned each of them was sworn by the undersigned, as special examiner, to tell the truth, the whole truth, and nothing but the truth; that their testimony was then read over to each of them after it was given, and they each approved of the same, and in token thereof signed the original stenographic notes of said testimony.

Dated at Pendleton, Oregon, this 26th day of February, 1901.

CHAS. H. CARTER.
Special Examiner.

Filed March 1, 1901. J. A. Sladen, Clerk United States Circuit Court, District of Oregon.

And to wit, on the 24th day of November, 1900, there was duly filed in said court the deposition of G. W. Harper, in words and figures as follows, to wit:

In the Circuit Court of the United States for the District of Oregon.

Commission for Taking Deposition of G. W. Harper.

The President of the United States of America, to James W. Marshall, United States Commissioner, Spokane, Washington, Greeting:

Know ye, that we, in confidence of your prudence and fidelity, have appointed you a commissioner, and by these presents do give you full power and authority diligently to examine G. W. Harper, upon his corporal oath, or affirmation, before you to be taken, and upon the interrogatories and cross-interrogatories hereto annexed, as a witness on the part of the defendant, in a certain cause now pending undetermined in the Circuit Court of the United States of America for the District of Oregon, wherein Philomme Smith is plaintiff and Hy-yu-tse-mil-kin is defendant; and we do hereby require you, before whom such testimony may be taken, to reduce the same to writing, and to close it up under your hand and seal, and direct it to the clerk of the above-entitled court, at Portland, in the District of Oregon, as soon as may be after the execution of this commission; and that you return the same, when executed as above directed, with the title of the cause endorsed on the envelope of the commission.

Witness the Honorable MELVILLE W. FULLER, Chief Justice of the Supreme Court of the United States, at Portland, in said District, this the 14th day of November, A. D. 1900.

[Seal of the U. S. Circuit Court, District of Oregon.]

J. A. SLADEN,
Clerk.

In the Circuit Court of the United States for the District of Oregon.

PHILOMME SMITH,
Plaintiff,
vs.
HY-YU-TSE-MIL-KIN,
Defendant.

Interrogatories to be Propounded to G. W. Harper:

Interrogatory 1. State your name, age, residence and occupation.

Interrogatory 2. State what official position you held upon the Umatilla Indian Reservation in the State of Oregon, and during what time.

Interrogatory 3. While you were such officer, were you acquainted with the plaintiff, Philomme Smith?

Interrogatory 4. Where did she reside?

Interrogatory 5. Do you remember the description of the tract of land upon which she resided and that which she claimed as her allotment?

Interrogatory 6. Did you know the defendant, Hy-yu-tse-mil-kin?

Interrogatory 7. Did you know the land which was allotted to him?

Interrogatory 8. What claim, if any, did the plaintiff make to that land?

Interrogatory 9. Was she in possession of it?

Interrogatory 10. Did she have any improvements upon it?

Interrogatory 11. State, if you know, how she lost possession of that land.

Interrogatory 12. State what you did in your official capacity to compel her to give up possession of that land.

Interrogatory 13. Did she leave it voluntarily, or was she compelled to leave it, and if so, how and by what authority?

Interrogatory 14. State, if you know, whether Mrs. Smith afterwards selected another tract of land, and if so, why did she do so?

Interrogatory 15. State who, if anyone, talked and acted for Mrs. Smith in this matter.

Interrogatory 16. State what, if anything, was said by Mrs. Smith, or her husband for her, about still holding or claiming her rights to the land which they were compelled to give up to the defendant, at or about the time she was compelled to make her second selection.

In the Circuit Court of the United States for the District of Oregon.

PHILOMME SMITH, Plaintiff,

vs.

HY-YU-TSE-MIL-KIN, Defendant.

Cross-Interrogatories to be Propounded to G. W. Harper:

Cross-interrogatory No. 1. State fully the character and value of the improvements upon the tract of land that was awarded to defendant by the allotting commissioner.

Cross-interrogatory No. 2. State whether or not there was any person living upon said tract of land at the time of said allotment.

Cross-interrogatory No. 3. State how much land was allotted subsequently to Philomme Smith, and who selected it.

Cross-interrogatory No. 4. Please state generally anything that you know regarding this case that is pertinent thereto.

Filed November 14, 1900. J. A. Sladen, Clerk United States Circuit Court, District of Oregon.

In the Circuit Court of the United States for the District of Oregon.

PHILOMME SMITH,
Plaintiff,
vs.
HY-YU-TSE-MIL-KIN,
Defendant.

Deposition of G. W. Harper.

I, G. W. Harper, of Spokane, Spokane County, State of Washington, being first duly sworn to tell the truth, the whole truth, and nothing but the truth in answer to interrogatories and cross-interrogatories annexed to the foregoing commission, deposes and says as follows:

Direct Examination of G. W. Harper.

To the first interrogatory I answer: My name, G. W. Harper; age, fifty-five years; present or temporary residence, Spokane, Washington; business, lodging-house.

To the second interrogatory I answer: I was Indian agent from January 16th, 1894, to April 1st, 1898.

(Deposition of G. W. Harper.)

To the third interrogatory I answer: I was.

To the fourth interrogatory I answer: She resided upon the reservation.

To the fifth interrogatory I answer: Do not remember the description of the land.

To the sixth interrogatory I answer: Yes.

To the seventh interrogatory I answer: Yes.

To the eighth interrogatory I answer: The plaintiff claimed the land and exercised acts of ownership over it part of the time I was agent—claimed that she rented the land and improved it before it was allotted.

To the ninth interrogatory I answer: Yes, up to a short time before I went out.

To the tenth interrogatory I answer: Yes, it was fenced —stable and barn on it, a well and another house for harness, grain, etc.

To the eleventh interrogatory I answer: I was ordered by Indian commissioner to take police and put Mrs. Smith off the land claimed by Hy-yu-tse-mil-kin. I informed Mrs. Smith of my orders and she said she would go off the land without being forced, but would go under protest, and continue to claim the land.

To the twelfth interrogatory I answer: Nothing but what I stated in interrogatory No. 11.

To the thirteenth interrogatory I answer: She did not leave it voluntarily but by order of the commissioner as detailed in answer 11.

To the fourteenth interrogatory I answer: She left the land, selected another tract. She did so because I, as

(Deposition of G. W. Harper.)

agent, was ordered by Indian commissioner to allot her and children on other land.

To the fifteenth interrogatory I answer: Her husband, Mr. Frank Smith, and herself. She was often with him.

To the sixteenth interrogatory I answer: Before Mrs. and Mr. Smith made a selection they came to my office and asked me if it would affect their rights in the Hy-yu-tse-mil-kin land for them to select land as directed by the commissioner. I told them I did not think it would; that they were acting under orders from an officer and did not do so of their own free will.

Cross-Examination of G. W. Harper.

To the first cross-interrogatory I answer: The improvements were a wire fence around the land, barn and stables, and another house used for harness, grain, etc., and a well. The value of the improvements, considering the time they were made, are worth near ($1500) fifteen hundred dollars; the houses are logs.

To the second cross-interrogatory I answer: I do not know if anyone was.

To the third cross-interrogatory I answer: One hundred and sixty acres to Philomme Smith as head of the family. I do not remember how many children they had and do not know much was allotted to the children. Mr. Smith acted for Philomme Smith in selecting the land.

To the fourth cross-interrogatory I answer: I remember nothing further pertinent to the case.

GEORGE W. HARPER.

State of Washington,
County of Spokane. }

This certifies that I, J. W. Marshall, United States Commissioner for the District of Washington (residing at Spokane), by virtue of the foregoing commission to me directed, caused the above-named G. W. Harper to come before me in Spokane, Spokane County and State of Washington, on the 21st day of November, at Spokane, and that the foregoing deposition was taken before me at Spokane, in said county, on the last day named, between the hours of ten o'clock A. M. and five o'clock P. M. of said day, and the same was by me reduced to writing; that before proceeding to examine the said deponent he was by me duly sworn to tell the truth, the whole truth, and nothing but the truth, in answer to the interrogatories and cross-interrogatories annexed, and thereupon he made the foregoing answers; that the said deposition when completed was read by me to said deponent, and the same was thereupon signed by him in my presence.

In testimony whereof, I have hereunto set my hand and official seal this 22d day of November, 1900.

[Commissioner's Seal] J. W. MARSHALL,
United States Commissioner, District of Washington.

Filed November 24, 1900. J. A. Sladen, Clerk, United States Circuit Court, District of Oregon.

And to wit, on the 1st day of March, 1901, there was duly filed in said court the deposition of J. B. Eddy, in words and figures as follows, to wit:

In the Circuit Court of the United States for the District of Oregon.

PHILOMME SMITH,
Plaintiff,
vs.
HY-YU-TSE-MIL-KIN,
Defendant.

Deposition of J. B. Eddy.

R. J. SLATER, for Plaintiff.

JOHN H. HALL, as United States Attorney, for the Defendant.

An order having been heretofore made by the Judge of the above-entitled court, directing that the testimony of J. B. Eddy be taken before J. A. Sladen as special United States Commissioner in the above-entitled cause, and reduced to writing, and transmitted to Charles H. Carter, of Pendleton, as special referee in said cause, and the parties appearing by their respective counsel:

J. B. Eddy, after being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. HALL.)

State your name, age, residence, and occupation.

A. J. B. Eddy; forty-six years old; residence, Forest Grove, Oregon; occupation, attorney.

(Deposition of J. B. Eddy.)

Q. Mr. Eddy, you were one of the allotting agents appointed by the President of the United States to allot the lands upon the Umatilla Indian Reservation in severalty to those Indians? A. I was.

Q. I will ask you whether you recall to mind the allotment to the defendant in this case, Hy-yu-tse-mil-kin.

A. I do.

Q. It appears from the record that the said Hy-yu-tse-mil-kin was allotted the southeast quarter of section 20, in township 3 north, range 34 east of the Willamette meridian, containing one hundred and sixty acres of land. I will ask you whether or not Hy-yu-tse-mil-kin selected this particular tract of land as his allotment.

A. He did.

Q. You may state, briefly, the circumstances under which said allotment was made, and the condition of the land.

A. Under our instructions from the Indian office, we were directed that each head of a family should make the selection of land for himself and the members of his family; and out on the prairie it was customary for the Indians, or those claiming lands, to run a furrow around their claim; and when we went to make the allotment to Hy-yu-tse-mil-kin, he went with us to this quarter section in question, and indicated it by the furrow which was plowed around it—said it was his land; and it was so allotted and recorded.

Q. I will ask you whether, prior to that time, Philomme Smith, the plaintiff in this case, had demanded

(Deposition of J. B. Eddy.)

that said land he allotted to her, of the commissioners?

A. No, she had not; not at that time.

Q. Did she make any demand before the allotment to Hy-yu-tse-mil-kin? A. Not that I know of.

Q. Did she make any such demand to you?

A. No.

Q. Or in your presence? A. No.

Q. I will ask you whether or not at that time the allotting commissioners, of which you were one, made any allotment to Philomme Smith or the members of her family. A. No.

Q. For what reason?

A. Because we had been directed by the Commissioner of Indian Affairs not to allot Mrs. Smith or her children lands on the reservation.

Q. Where was Mrs. Smith residing at that time, if you know?

A. Just across on the quarter section immediately south of the quarter section claimed by Hy-yu-tse-mil-kin.

Q. Did she have a residence there—a house?

A. Yes; she had a log house; I am pretty certain it was.

Q. What, if any, improvements were on the land allotted to Hy-yu-tse-mil-kin?

A. I think, with the exception of the furrow that was run around, there was a kind of shed, a little shed of some sort; I think it was on that quarter, but I would not be positive. I am reasonably sure, though, that there was some kind of little fixing that was used as a shed for stock; a small affair.

(Deposition of J. B. Eddy.)

Cross-Examination.

(Questions by Mr. SLATER.)

Q. Are you certain that there was no fence around this quarter section?

A. I am pretty certain there was no fence about it. Of course, it is several years ago; but I am reasonably sure that that quarter section was not fenced.

Q. Was it not enclosed, with other lands, by a wire and post fence?

A. Well, now, it may be possible; because they were in the habit, those Indians, of renting their lands in bodies to people; and they would run a fence around and take in a whole mint of country. But I am certain it was not enclosed by itself as a quarter section.

Q. Prior to the time you allotted this land to the defendant, didn't Mrs. Smith apply to you for an allotment?

A. No. She applied first, if I remember right—I think I do—to be listed as an Indian. We were supplied with a list of all the Indians upon the reservation, that was taken by a commission sent there some years before for that purpose; and we were directed to allot lands to all persons whose names were on that list, if they were alive on the 14th day of April, 1891, and their children that might have been born before that time; and there was also a subsequent list made and sent to us, that had been filed with the department afterwards, containing some, perhaps ten or a dozen names, with instructions for us to inquire into their rights on the reservation. Among those names was that of Mrs. Smith and her children;

and we took testimony of the Indians in relation to the rights of these people, and sent that testimony to the Commissioner of Indian Affairs at Washington; and he directed us that they were not entitled to lands, and to make no allotment.

It is stipulated and agreed that the witness may sign the shorthand notes, as the signature to his testimony.

United States of America,
District of Oregon. } ss.

I, Joseph A. Sladen, clerk of the Circuit Court of the United States, for the District of Oregon, and special commissioner duly appointed by said Circuit Court of the United States, to take the foregoing testimony of J. B. Eddy, a witness on behalf of the above-named defendant, do certify as follows:

I. That pursuant to the foregoing order of the Honorable Charles B. Bellinger, District Judge for the District of Oregon, sitting as presiding Judge in the Circuit Court of the United States for said District of Oregon, the foregoing deposition of J. B. Eddy was taken before me on the part of the defendant in the above-entitled cause, at my office, in the city of Portland, and in said District of Oregon, on this 28th day of December, in the year of our Lord nineteen hundred.

II. That upon the taking of said deposition I was attended by Mr. R. J. Slater, of counsel for the complainant, and by Mr. John H. Hall, United States Attorney, on behalf of said defendant.

III. That the witness, before being examined, was by me duly cautioned and sworn to tell the truth, the whole truth, and nothing but the truth, and that the testimony of said witness was by consent of both parties taken stenographically by M. A. Fleming, in my presence, and was by said M. A. Fleming duly extended.

IV. That by consent of both parties the said witness attached his signature to the stenographic report of his testimony, as taken down by said M. A. Fleming, in lieu of attaching said signature to said testimony when extended.

V. I further certify that I am not of counsel nor attorney for either of the parties hereto, nor in any way interested in the event of this cause.

VI. That I have retained said deposition in my possession until delivered by me, in a sealed package, in the United States mails, for transmission to Chas. H. Carter, special referee herein, at Pendleton, Oregon, and that said testimony, together with this certificate, were enclosed in a sealed package, directed to said Chas. H. Carter, at Pendleton, Oregon, duly stamped and registered in the postoffice at Portland, Oregon, for transmission to the above Chas. H. Carter.

In testimony whereof, I have hereunto set my hand and affixed the official seal of my office at said city of Portland, in said District of Oregon, this 28th day of December, A. D. 1900.

[Seal] JOSEPH A. SLADEN,
Clerk United States Circuit Court, for the District of Oregon, Special Commissioner.

In the Circuit Court of the United States for the District of Oregon.

PHILOMME SMITH,

Plaintiff,

vs.

HY-YU-TSE-MIL-KIN,

Defendant.

No. 2,595.
Nov. 12, 1900.

Order Appointing J. A. Sladen Special Examiner.

Now, at this day, comes the plaintiff, by Mr. John H. Hall, United States Attorney, and moves the Court for an order appointing a special examiner to take the testimony in this cause at Portland, Oregon. On consideration whereof, it is ordered that J. A. Sladen, Clerk of the United States Circuit Court for the District of Oregon, be, and he is hereby, appointed a special examiner of this Court, to take and reduce to writing and transmit to the Court the testimony of J. B. Eddy, a witness on the part of the defendant in this cause, said testimony to be taken at such time and place in the city of Portland, in this State and District as said special examiner shall appoint, due notice thereof having been given to the parties hereto.

CHARLES B. BELLINGER,
Judge.

Filed November 12, 1900. J. A. Sladen, Clerk.

United States of America,
District of Oregon. } ss.

I, J. A. Sladen, Clerk of the United States Circuit Court for the District of Oregon, do hereby certify that the foregoing copy of order appointing J. A. Sladen special examiner in cause No. 2,595, Philomme Smith vs. Hy-yu-tse-mil-kin, has been by me compared with the original thereof, and that it is a correct transcript therefrom, and of the whole of such original, as the same appears of record and on file at my office and in my custody.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Portland in said District this November 17th, 1900.

[Seal] J. A. SLADEN,
Clerk.

Filed March 1, 1901. J. A. Sladen, Clerk United States Circuit Court, District of Oregon.

And afterwards, to wit, on the 11th day of September, 1901, there was duly filed in said court a petition for appeal, in words and figures as follows, to wit:

In the Circuit Court of the United States for the District of Oregon.

IN EQUITY.

HY-YU-TSE-MIL-KIN,
Appellant,
vs.
PHILOMME SMITH,
Appellee.
No. 2,595.

Petition for Appeal.

The above-named appellant, Hy-yu-tse-mil-kin, conceiving himself aggrieved by the order and decree made and entered on the 10th day of July, 1901, in the above-entitled cause, does hereby appeal from said order and decree to the United States Circuit Court of Appeals for the Ninth Circuit, for the reason specified in the assignment of errors which is filed herewith, and he prays that this appeal may be allowed, and that a transcript of the record, proceedings, and papers upon which said order and decree was made and duly authenticated may be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

Dated September 11th, 1901.

JOHN H. HALL,
United States Attorney, Solicitor for Plaintiff in Error.

The foregoing claim or appeal is hereby allowed this —— day of September, 1901.

_____,
Judge.

Filed September 11, 1901. J. A. Sladen, Clerk United States Circuit Court, District of Oregon.

And afterwards, to wit, on the 11th day of September, 1901, there was duly filed in said court an assignment of errors, in words and figures as follows, to wit:

In the Circuit Court of the United States for the District of Oregon.

IN EQUITY.

HY-YU-TSE-MIL-KIN,
Appellant,
vs.
PHILOMME SMITH,
Appellee.
No. 2,595.

Assignment of Errors.

The appellant in the above-entitled suit, in connection with his petition for an appeal, makes the following assignment of errors, which he avers occurred upon the trial of the cause:

1st. The Court erred in overruling defendant's demurrer to the bill of complaint.

2d. The Court erred in overruling the defendant's ex-

ception to the first finding of fact as made by the special examiner.

3d. The Court erred in overruling the defendant's exceptions to the ninth finding of fact of the special examiner.

4th. The Court erred in overruling defendant's exceptions to the 10th finding of fact as found by the special examiner.

5th. The Court erred in overruling defendant's exceptions to the twelfth finding of fact of the special examiner.

6th. The Court erred in overruling defendant's exceptions to the thirteenth finding of fact as found by the special examiner.

7th. The Court erred in overruling defendant's exception to the fifteenth finding of fact as found by the special examiner.

8th. The Court erred in decreeing that the report of C. H. Carter, Special Examiner in Chancery, be confirmed.

9th. The Court erred in decreeing that allotment heretofore made by J. E. Eddy and J. P. Bushee, as commissioners of the United States of America, of the following land situated upon the Umatilla Indian Reservation in Umatilla County, State of Oregon, to wit:

The southeast ¼ of section 20, township 3 north, range 34 east of the Willamette Meridian, to the defendant Hyyu-tse-mil-kin, which allotment was approved by the Honorable Secretary of the Interior April 12, 1893, be canceled.

10th. The Court erred in decreeing that "said land as

hereby allotted to the plaintiff, Philomme Smith, and plaintiff is entitled to the immediate possession thereof, and the defendant, Hy-yu-tse-mil-kin, his servants, and all persons holding under him as tenants, lessors, or otherwise, are perpetually restrained and enjoined from in any manner interfering with plaintiff's possession thereof."

11th. The Court erred in decreeing "that said complainant have and recover from the defendant her costs and disbursements incurred in this suit and taxed at $137.42."

12th. The Court erred in rendering any decree in said cause for the reason that the United States of America was a necessary and indispensable party defendant in said suit.

13th. The Court erred in refusing to enter a decree dismissing plaintiff's bill of complaint.

JOHN H. HALL,
United States Attorney for the District of Oregon.

Filed September 11, 1901. J. A. Sladen, Clerk United States Circuit Court, District of Oregon.

And afterwards, to wit, on Wednesday, the 11th day of September, 1901, the same being the 133d judicial day of the regular April term of said Court—Present, the Honorable CHARLES B. BELLINGER, United States District Judge presiding—the following proceedings were had in said cause, to wit:

In the Circuit Court of the United States for the District of Oregon.

IN EQUITY.

HY-YU-TSE-MIL-KIN,
Appellant,
vs.
PHILOMME SMITH,
Appellee.
No. 2,595.

Order Allowing Appeal.

On this 11th day of September, 1901, came the appellant, Hy-yu-tse-mil-kin, by John H. Hall, United States Attorney for the District of Oregon, appearing in his behalf, and filed herein and presented to the Court his petition praying for the allowance of an appeal intended to be urged by him to the Court of Appeals for the Ninth Circuit; praying also that a transcript of the record, proceedings, and evidence and papers on which the judgment, order, and decree was herein rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the said Ninth Judicial Circuit, and such other and further proceedings may be had as may be proper in the premises.

In consideration whereof the Court does hereby allow the appeal prayed for.

CHARLES B. BELLINGER,
Judge.

Filed September 11, 1901. J. A. Sladen, Clerk United States Circuit Court, District of Oregon.

And afterwards, to wit, on Saturday, the 12th day of October, 1901, the same being the 6th judicial day of the regular October term of said Court—Present, the Honorable CHARLES B. BELLINGER, United States District Judge presiding—the following proceedings were had in said cause, to wit:

In the Circuit Court of the United States for the District of Oregon.

PHILOMME SMITH,
Plaintiff,
vs.
HY-YU-TSE-MIL-KIN,
Defendant.

No. 2,595.
Oct. 12, 1901.

Order Extending Time to File Transcript.

Now, at this day, for good cause shown, it is ordered that the time within which the defendant is required to file the transcript of record in this cause, in the office of the clerk of the United States Circuit Court of Appeals for the Ninth Circuit, be, and the same is hereby, extended thirty days.

WM. B. GILBERT,
Circuit Judge.

Filed October 12, 1901. J. A. Sladen, Clerk United States Circuit Court, District of Oregon.

Clerk's Certificate to Transcript.

United States of America,
District of Oregon. } ss.

I, J. A. Sladen, clerk of the Circuit Court of the United States for the District of Oregon, in obedience to the within order allowing appeal, do hereby certify that the foregoing pages, numbered from 2 to 152, inclusive, contain a true and complete transcript of the record and proceedings had in said court, in the cause of Philomme Smith, plaintiff, vs. Hy-yu-tse-mil-kin, defendant, as the same appears of record and on file in my office and custody.

And I further certify that the cost of the said record is seventy-eight 80-100 dollars, and that the same has been charged in my account in said cause with the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court, at Portland, in said District, this 23d day of October, A. D. 1901.

[Seal] J. A. SLADEN,
Clerk United States Circuit Court for the District of Oregon.

[Endorsed]: No. 766. In the United States Circuit Court of Appeals for the Ninth Circuit. Hy-yu-tse-mil-kin, Appellant, vs. Philomme Smith, Appellee. Transcript of Record. Appeal from the Circuit Court of the United States for the District of Oregon.

Filed October 26, 1901.

F. D. MONCKTON,
Clerk.

153½ At a stated term, to wit: the October term, A. D. 1901, of the United States circuit court of appeals for the ninth circuit, held at the court room, in the city and county of San Francisco, on Friday, the —— day of February, in the year of our Lord one thousand nine hundred and two.

Present: The Honorable William B. Gilbert, circuit judge; Honorable Thomas P. Hawley, district judge; Honorable John J. De Haven, district judge.

HY-YU-TSE-MIL-KIN, APPELLANT,
v.
PHILOMME SMITH, APPELLEE. } No. 766.

Order of submission in U. S. circuit court of appeals.

Ordered, appeal argued by John H. Hall, esquire, United States attorney, counsel for the appellant, and R. J. Slater, esquire, counsel for the appellee, and submitted to the court for consideration and decision.

154 In the United States circuit court of appeals for the ninth circuit.

HY-YU-TSE-MIL-KIN, APPELLANT,
vs.
PHILOMME SMITH, APPELLEE. } No. 766.

Opinion.

Appeal from the circuit court of the United States for the district of Oregon.

John H. Hall, U. S. attorney, for appellant.
R. S. Slater and J. T. Hinkle, for appellee.

Before Gilbert, circuit judge, and Hawley and De Haven, district judges.

DE HAVEN, District Judge: This a suit in equity. The complainant is a full-blooded Indian woman, and a member of the Walla Walla band of Indians residing in the State of Oregon. The prayer of the bill is that an allotment of a certain quarter section of land, part of the Umatilla Indian Reservation, made to the defendant, be canceled, and for a decree that the complainant was and is entitled to have said land allotted to her under the act of Congress of March 3, 1885 (23 Stats., 340), providing for the allotment of lands in severalty to the Indians residing upon the Umatilla Reservation in the State of Oregon. The decree of the circuit court was in favor of the complainant, and from this decree the defendant has appealed.

155 1. The appellant contends that the circuit court was without jurisdiction of the cause; that under section 6 of the act of Congress of March 3, 1885, the act above referred to, the action of the Secretary of the Interior in making the allotment of the land in controversy was final and cannot be made the subject of review in the courts. We are of the opinion, however, that the action was properly brought under the act of August 15, 1894 (28 Stats., 305), which provides:

"That all persons who are in whole or in part of Indian blood or descent who are entitled to an allotment of land under any law of Congress, or who claim to be so entitled to land under any allotment act or under any grant made by Congress, or who claim to have been unlawfully denied or excluded from any allotment or any parcel of land to which they claim to be lawfully entitled by virtue of any act of Congress, may commence and prosecute or defend any action, suit, or proceeding in relation to their right thereto, in the proper circuit court of the United States. And said courts are hereby given jurisdiction to try and determine any action, suit, or proceeding arising within their respective jurisdictions, involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any law or treaty. And the judgment or decree of any such court in favor of any claimant to an allotment of land shall have the same effect, when properly certified to the Secretary of the Interior, as if such allotment had been allowed and approved by him;" * * * This language is certainly broad enough to confer upon the circuit court jurisdiction to hear and determine the complaint of any person who is "in whole or in part of Indian blood," who claims "to have been unlawfully denied or excluded from any allotment or parcel of land" to which such person
156 claims "to be lawfully entitled by virtue of any act of Congress," and such is the nature of the bill filed by the complainant in this action.

2. The United States is not a necessary party to the suit. The matter in dispute here is between individuals, and involves simply a question of private right. We cannot see any necessity for making the United States a party to such an action in the absence of a statute requiring that it shall be done. In answer to the suggestion that the United States is interested in the question to whom the land in controversy shall be allotted, and unless made a party to the action will not be bound by the decree, it is sufficient to say that the United States has by the statute from which the above *question* is made, provided that a controversy of this character may be determined by an appropriate action in the circuit court, and that the decree therein shall have the same effect as an allotment allowed and approved by the Secretary of the Interior. An allotment made by or under the direction of the Secretary of the Interior entitles the allottee to a patent for the land allotted to him. (Sec. 1, act of March 3, 1885, 23 Stats., 340.) The provision in the statute that the decree of the court in an action like this shall have the same effect as an allotment made by the Secretary of the Interior entitles the successful party to a patent for the land allotted to him by the decree, and is in effect a consent upon the part of the United States to be bound by such decree and to issue its patent in accordance therewith.

3. We now proceed to inquire whether the decree of the circuit court is right upon the merits. The complainant is an Indian woman of full blood, a member of the Walla Walla tribe of Indians. In the year 1887, she, with the consent of the chiefs of the Walla Walla and Cayuse Indians, selected the land in controversy with the intention of having the same
157 allotted to her under the act of March 3, 1885 (23 Stats., 340), and she and her husband improved it by the erection thereon of a granary and two barns, and also enclosed it together with other lands selected

by her for her family. The total value of these improvements when made was about $700. The land was allot'ed to defendant in the year 1891. He did not have possession thereof at the time, or any improvements thereon. When the allotment was made the complainant was in possession of the land in controversy, although she and her family were actually residing upon other land with which it was enclosed. Prior to its allotment to defendant the complainant requested the commissioners, appointed for the purpose of making allotments of land on the Umatil'a Reservation, to allot the same to her, but they refused so to do because her name was not upon the census list of persons entitled to an allotment, and this action was approved by the Department of the Interior. It also appears that the census list was completed on June 7, 1887, and complainant was at that time living outside of the reservation upon lands which members of her tribe had been accustomed to occupy for hunting and fishing, and she did not take up her actual residence upon the reservation until shortly after the census was taken. At the time of receiving the allotment of the land in controversy the defendant had notice of all these matters. The complainant continued in possession of said land until the fall of 1896, when she removed therefrom in obedience to orders given her by the Indian agent in charge of the Umatilla Indian Reservation. In April, 1897, the Secretary of the Interior decided that complainant was entitled to an allotment of land on the Umatilla Indian Reservation, and in pursuance of that decision certain lands were allotted to her, and she accepted the same after being informed by the Indian agent that in his opinion such acceptance would not prej-
158 udice her right to the land in controversy. Since that time she has leased a portion of the land so allotted to her and received a stipulated rent therefor. Upon these facts we entertain no doubt of the justice of the decree of the circuit court. Under the act of Congress of March 7, 1885 (23 Stats., 340), it is provided that: "All allotments to heads of families and to children under eighteen years of age belonging to families shall be made upon selections made by the heads of the family, and allotments to persons over eighteen years of age not classed as heads of families shall be made upon the selection of such persons." Section 6 of the act further provided that the Secretary of the Interior should "have power to determine all disputes and questions arising between Indians respecting their allotments." The State conferred upon the Indians the right of selecting the land which they wished to have allotted to them, and if there was only one claimant to a tract such claimant was entitled to receive an allotment thereof. If, however, more than one person made selection of the same tract, we think it was the intention of Congress that the allotment should be made with reference to priority of selection, residence, and improvements. This is the principle upon which the Government has always proceeded in the disposal of its public lands. Shepley v. Cowan, 91 U. S., 330. And although the statute does not expressly so declare, we have no doubt that it must be so interpreted as to make it the duty of the Secretary of the Interior, in determining disputes and questions arising between Indians respecting their allotments, to proceed upon this principle. The complainant was therefore, by reason of her selection of the same and prior possession and improvements thereon, equitably entitled to have the land in controversy

allotted to her, and the only reason why her right was not recognized
159 by the Secretary of the Interior was because she was not residing upon the reservation when the commission appointed for that purpose made up the list of those entitled to take lands in severalty. This was an erroneous view of the law. Under the treaty of June 9, 1855, made with the Walla Walla, Cayuse, and Umatilla Indian tribes (12 Stats., 945), the privilege of hunting, gathering roots and berries, and pasturing their stock on unclaimed lands, in common with citizens, and to fish in the streams bordering on the reservation in which they had been accustomed to fish, was reserved to the Indians, and the claimant did not forfeit her right to an allotment by living with her family upon lands which her tribe had been accustomed to occupy. She was upon the reservation and in possession of the land in controversy, and had selected the same before it was allotted to defendant, and more was not required of her in order to give her an equitable right thereto. In denying her right to the allotment claimed by her the Secretary of the Interior committed an error of law which can be corrected by a court of equity, in accordance with the rule declared in Johnson v. Townsley, 13 Wall., 78; Moore v. Robbins, 96 U. S., 530; Shepley v. Cowan, 91 U. S., 340. Nor is the complainant estopped from maintaining this action by the subsequent action of the Government in allotting other lands to her. She accepted the allotment made to her upon the assurance of the Indian agent in charge of the reservation that her claim to the land in controversy would not be prejudiced thereby. No patent has been issued for the land so allotted to her and no further action on her part is necessary in order to authorize the Government to cancel such allotment. Certainly the defendant has been in no wise injured by this subsequent action of the complainant. If she had accepted the land allotted to her in satisfaction of her claim under the treaty and act of Congress, a dif-
160 ferent question would be presented. The decree of the circuit court is affirmed.

(Endorsed:) Opinion. Filed Oct. 6th, 1902. F. D. Monckton, clerk.

161 United States circuit court of appeals for the ninth circuit.

HY-YU-TSE-MIL-KIN, APPELLANT,
v.
PHILOMME SMITH, APPELLEE. } No. 766. Decree.

Appeal from the circuit court of the United States for the district of Oregon.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the district of Oregon and was argued by counsel.

On consideration whereof it is now here ordered, adjudged, and decreed by this court that the decree of the said circuit court in this cause be, and the same is hereby, affirmed.

(Endorsed:) Decree. Filed and entered, Oct. 6, 1902. F. D. Monckton, clerk.

162 In the United States circuit court of appeals for the ninth circuit.

HY-YU-TSE-MIL-KIN, APPELLANT,
vs.
PHILOMME SMITH, APPELLEE. } No. 766.

Petition for appeal.

The above-named defendant, Hy-yu-tse-mil-kin, conceiving himself aggrieved by the order and decree made and entered on the 6th day of October, 1902, in the above-entitled cause, doth hereby appeal from said order and decree to the Supreme Court of the United States, for the reason specified in the assignment of errors which is filed herein, and prays that this appeal may be allowed, and that a transcript of the record, proceedings, and papers upon which said order and decree was made and duly authenticated may be sent to the Supreme Court of the United States.

JOHN H. HALL,
U. S. Attorney and Attorney for Appellant by direction of the Attorney-General of the United States.

And now, to wit, upon this 5 day of December, 1902, it is ordered that above appeal be allowed as prayed for.

WM. B. GILBERT,
Presiding Judges of Court of Appeal.

(Endorsed:) Petition for appeal. Order allowing appeal. Filed December 8, 1902. F. D. Monckton, clerk.

163 In the United States circuit court of appeals for the ninth circuit.

HY-YU-TSE-MIL-KIN, APPELLANT,
vs.
PHILOMME SMITH, APPELLEE. } No. 766.

Assignment of errors.

The appellant in the above-entitled suit, in connection with his petition for appeal, makes the following assignment of errors, which he avers occurred upon the trial of the cause in the above-entitled court:

1st. The court erred in holding and decreeing that the complainant is a full-blooded Indian woman, and a member of the Walla Walla band of Indians; such finding is not supported by the evidence given in said cause.

2nd. The court erred in holding and decreeing that the circuit court of the United States for the district of Oregon had jurisdiction over the subject-matter of said suit, and the right and authority to make reallotments of lands to Indians.

3rd. The court erred in holding that the United States is not a necessary party to the suit.

4th. The court erred in holding that the complainant was entitled to allotment of land upon the Umatilla Indian Reservation.

5th. The court erred in finding that on June 7th, 1887, complainant

was living upon lands which members of her tribe had been accustomed to occupying for hunting and fishing, and that said finding is not supported by the evidence adduced at the trial of the cause.

164 6th. The court erred in holding that priority of selection gives priority of right to allotment of lands to Indians upon Indian reservations, and that it is the duty of the Secretary of the Interior in determining disputes and questions arising between Indians respecting their allotments to proceed upon this principle.

7th. The court erred in holding that in denying complainant's right to allotment claimed by her, the Secretary of the Interior committed an error which can be corrected by a court of equity.

8th. The court erred in affirming the decree in this cause to the circuit court of the United States for the district of Oregon.

9th. The court erred in refusing to reverse the decree of the circuit court of the United States for the district of Oregon in said cause.

JOHN H. HALL,
U. S. Attorney for the District of Oregon.

(Endorsed:) Assignment of errors. Filed Dec. 8, 1902. F. D. Monckton, clerk.

165 United States circuit court of appeals for the ninth circuit.

HY-YU-TSE-MIL-KIN, APPELLANT,
v.
PHILOMME SMITH, APPELLEE. } No. 766.

Certificate of clerk circuit court of appeals to transcript on appeal.

I, Frank D. Monckton, clerk of the United States circuit court of appeals for the ninth circuit, do hereby certify the foregoing one hundred and sixty-four (164) pages, numbered from one (1) to one hundred and sixty-four (164), inclusive, to be a true copy of the record, the opinion of the court, the assignment of errors, and of all proceedings in the above-entitled case as the same appear of record in my office, and that the same, together, constitute the transcript of record herein on appeal to the Supreme Court of the United States.

Attest my hand and the seal of the said the United States circuit court of appeals for the ninth circuit, at San Francisco, California, this 28th day of January, A. D. 1903.

[SEAL.] F. D. MONCKTON, *Clerk.*

166 In the circuit court of appeals for the ninth circuit.

HY-YU-TSE-MIL-KIN, APPELLANT,
vs.
PHILOMME SMITH, APPELLEE. } No. 766.

UNITED STATES OF AMERICA,
District of Oregon, ss.

To Philomme Smith, appellee, and to R. J. Slater, her attorney:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be holden at the city of Washington, on

Monday the 2nd day of March, 1903, pursuant to an appeal filed in the clerk's office of the circuit court of appeals for the ninth circuit wherein Hy-yu-tse-mil-kin is appellant and Philomme Smith is respondent, to show cause, if any there be, why decree in said suit mentioned should not be corrected and reversed, and speedy justice should not be done to the parties on that behalf.

Witness the Honorable Melvill W. Fuller, Chief Justice of the U. S., this 22nd day of January, in the year of our Lord one thousand nine hundred and three.

WILLIAM B. GILBERT,
Circuit Judge.

Dated at Portland, Oregon, this 22nd day of January, 1903.

167 Due and legal service of the foregoing citation on appeal is hereby accepted at Portland, Oregon, this 22d day of January, 1903.

R. J. SLATER,
Attorney for Appellee.

168 (Indorsed:) No. 766. In the circuit court of appeals for the ninth circuit. Hy-yu-tse-mil-kin, appellant, vs. Philomme Smith, appellee. Citation on appeal. Filed January 27, 1903. F. D. Monckton, clerk.

(Indorsement on cover:) File No. 18824. U. S. C. C. of appeals, 9th circuit. Term No. 596. Hy-yu-tse-mil-kin, appellant, vs. Philomme Smith. Filed February 5th, 1903.

O

IN THE

UNITED STATES

OCTOBER TERM, 1909.

NO. 594

[redacted],

Appellant,

vs. (13,624)

PHILOMIE SMITH,

Appellee.

SAMUEL HERRICK AND HAILEY & LOWELL,

Attorneys for Appellant.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

FILED.....

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1903.

No. _____

HY-YUTSE-MIL-KIN, *Appellant.*	
vs.	No. 596
PHILOME SMITH, *Appellee.*	

BRIEF OF APPELLANT.

STATEMENT.

This is a suit brought by the appellee as complainant in the Circuit Court of the United States for the District of Oregon against appellant to cancel an allotment of land made to appellant on the Umatilla Indian Reservation in Oregon

in 1891, and to have the same allotted to her. The land consists of 160 acres, and was allotted to appellant under a special act of Congress, approved March 3, 1885, providing for the allotment of lands in severalty to the Indians residing upon said reservation.

The plaintiff claims her right to bring suit under the act of Congress approved August 15, 1894, conferring jurisdiction upon the United States Circuit Courts to determine the rights of claimants to allotments on Indian lands.

In her complaint she claims that at the time the lands were allotted to appellant she was a full blooded Indian woman, and a member of the Walla Walla band of Indians, and the head of a family, and resided upon said Umatilla Reservation, upon the particular tract of land allotted to appellant, and that prior to said allotment she settled upon, took possession of, and enclosed and made extensive improvements upon said tract of land, which is described as the southeast quarter of section 20, Tp. 3 north, of range 34, E. W. M.; and that at the time of the allotment she was residing upon and had actual possession of said tract, and that when the allotting commissioners were allotting, she went to them and selected said tract as her allotment, but that they refused to allot it to her, and wrongfully allotted it to appellant, and that she made her selection of this land before appellant did, and that he selected this tract, knowing that she had already selected it.

The appellant contends that appellee is not a member of the Walla Walla tribe of Indians, and never resided upon the Umatilla Reservation until 1888, three years after the passage of the allotment act, and one year after the allotment lists were completed, and that she did not settle nor reside upon the tract of land allotted him, but upon a separate tract south of appellant's allotment, and separately enclosed from his land, and that she never selected the tract allotted to him, and never cultivated the same prior to his allotment, and never made application to be allotted, but did make an application sometime after 1888 to be listed among those entitled to allotment, and also to be adopted

by the confederated tribes upon said reservation, and that appellant selected the land and was allotted upon it by the commissioners, and thereupon took possession of the land, and ever since has been in possession thereof, and that after the allotment of these lands to appellant the appellee's application made to the Secretary of the Interior to be listed as one entitled to an allotment was granted, and she thereafter, upon notice from the Secretary of the Interior, selected an allotment on another piece of land, which was allotted to her and accepted by her, and which she has ever since held and rented as her allotment.

Before referring to the facts of the case we desire to call the Court's attention to the terms of the treaty and Act of Congress governing the Umatilla Reservation and the allotments thereon, in order that the appellant's contention regarding the rights of allotment and selection thereon may be the more readily understood. Our contention is that only such Indians as actually resided upon the reservation at the time of the passage of the act and were recognized members of the confederated tribes thereon were entitled to allotment. In 1855 a treaty was concluded by the Government with the confederated Walla Walla, Cayuse, and Umatilla Indian tribes wherein said Indians ceded to the Government certain territory therein described, and "had set apart as a *residence* for said Indians" a certain tract within the ceded territory "to be held and regarded as an Indian Reservation," which tract included the present diminished reservation; and "said tribes and bands agreed to remove to and settle upon the same within one year after the ratification of this treaty."

In Article 2 of the treaty the Government agrees to pay certain sums to "the bands and tribes of Indians claiming territory and residing in said country, and who *remove to and reside upon said reservation.*"

In Article 3 and 4 of the treaty provision is made for the erection of buildings, fencing, opening farms, purchasing teams, farming implements, clothing, and provisions, saw-

mill, flouring mill, school books, etc., and to employ two school teachers.

Article 6 referes to this reservation as "a permanent home for those Indians," and provides for assigning definite tracts to individuals for homes and issuing patents therefor, and "that if any person or family shall at anytime neglect or refuse to occupy or till a portion of the land assigned and on which they have located, or shall roam from place to place, indicating a desire to abandon his home, the President, may, if the patent shall have been issued, cancel the assignment, and may also withhold from such person or family their portion of the annuities or other money due them until they shall have returned to such *permanent* home and resumed the pursuits of industry; and in default of their return the tract may be declared abandoned, and thereafter assigned to some other person or family of Indians residing on said reservation," thus showing that the intention of the treaty was to compel these Indians to make the reservation their permanent place of residence.

The Act of 1885 under which appellee claims her right to an allotment, in its title declares the purpose of the Act to be "to Provide for the Allotment of lands to the Indians *residing* upon the Umatilla Indian Reservation," and the first section of the Act provides "that the President of the United States cause lands to be allotted to the Indians *residing* upon the Umatilla Reservation" and that he appoint a commission "to go upon said reservation and estimate as near as may be the number of Indians who *will remain* on said reservation, and who shall be entitled to take lands in severalty thereon, and the amount of land required to make the allotments;" and the commission should set apart the land for allotments, pasturage, and timber, including 640 acres for an industrial farm or school, but not to exceed 120000 acres in the aggregate for all purposes. "This tract shall be surveyed and as soon as the surveys are approved by the Secretary of the Interior the selections and allotments shall be made." This clearly shows, along with

the spirit of the treaty, that the allotments were intended for the benefit of those Indians who were residing upon the reservation at the time of the passage of the Act, and not for persons who had never been residents thereon.

The appellee claims to have been born at Wallula, the point of confluence of the Walla Walla River with the Columbia River, in what is now the State of Washington, and some forty miles distant from the Umatilla Reservation, and admits that she never was on the Umatilla Reservation until she came there in the year 1888 to take land, and that she had been living from the fall of 1860 until 1888 at or near The Dalles, on the Columbia River, a point 150 miles from the Umatilla Reservation, and not even within the territory ceded by the Indians in 1855, but sixty or more miles west of the most western line of the ceded section. That prior to her removel to The Dalles in 1860 she had lived with her mother from early childhood at St. Paul, French Prairie, an old Hudson Bay trapper settlement near Salem, the capital of this State, and distant at least 280 miles from the reservation, and beyond the Cascade Mountains. That in 1888, a year after the allotment list had been made up, she came, with her family and husband, who is a white man, and settled upon the Umatilla Reservation, for the purpose of getting land under this allotment Act, and she claims to be entitled to an allotment on the ground that her mother was a member of the Walla Walla tribe of Indians, her father being an Iroquois trapper. The testimony of the tribal relations of her mother is almost entirely confined to the statements made by the mother herself, as the appellee personally knows nothing of her mother's tribal relations, and the appellee herself testifies that her mother was a half Walla Walla and a half Umatilla Indian, while one witness testifies that the mother of appellee belonged to the Wallula or Walla Walla tribe, but she does not say which, and in one place testifies that her father belonged to the Blackfeet Indians, and in another place that he was an Iroquois. The testimony of appellee clearly shows that her mother never maintained tribal relations

with any tribe of Indians whatever, but traveled from place to place with her trapper husband until his death, and after that lived at St. Paul, French Prairie, until 1860, and thereafter lived with her daughters and their white husbands at The Dalles, Oregon, until her death, and that she never was on the Umatilla Indian Reservation.

The testimony in regard to the selection of the allotment upon the reservation clearly shows that appellee and her husband. who is what is commonly known as a "squaw man," and whom she married, according to his testimony, when she was only 13 years old, had been residing at The Dalles, Oregon, for over 27 years, when they heard of the allotment of lands upon the Umatilla Indian Reservation, whereupon they came to the reservation, and her husband, acting for her, made application to the allotting commissioners to have herself and family listed among those who were entitled to allotments, but, not having been a resident of the reservation at the time the allotting list was made up, her application to be listed was submitted to the Secretary of the Interior, and under instructions from him it was denied. The testimony of Mr. Eddy, one of the allotting commissioners, is that she did not personally make any application, and that the only application made was by her husband to have her listed as one entitled to an allotment, that she did not make any selection of land for allotment. Her own testimony and that of her husband is that she never resided upon the lands allotted to the appellant, but did reside upon the northeast quarter of section 29, Tp. 3 north, of range 34, E. W. M.., in a field separately enclosed, south of the appellant's allotment, and that prior to the allotment of the land to appellant she had never cultivated any portion of the tract, but her husband had used it, in connection with other lands, for a pasture, and the only improvement placed upon it was a well dug by her husband and another man for their mutual benefit.

The only testimony that appellee, prior to the allotment of this land to appellant, had selected this land for allotment and made application to the allotting commissioners to be

allotted thereon is the testimony of her husband, which is positively contradicted by the allotting commissioner, Eddy, who says that prior to the time the land was allotted to appellant Mrs. Smith did not apply for an allotment, that she merely applied to be listed as an Indian, and that the commissioners had a list of all the Indians upon the reservation that was taken by the commission sent out some years before, and they were directed to allot lands to persons whose names were on that list still alive on the 14th of April, 1891, and that a subsequent list had been made and sent to them with Mrs. Smith's name and those of her children on it, and they had taken the testimony of the Indians in relation to the rights of these people, and reported it to the Commissioner of Indian Affairs, and he had directed them to make no allotments to these people, as they were not entitled to lands.

He also states that he is practically certain that there was no fence around the lands allotted to appellant at the time it was allotted to him, and this is the testimony of appellant himself and of Albert Minthorne, an educated Indian who testified in the case. Against this testimony is the sole testimony of appellee's husband, as all of the transactions between her and the allotting commissioners were conducted by him, she being unable to speak English.

The testimony further shows that after the allotment of these lands to appellant the appellee made application to the Department of the Interior for an allotment upon the Umatilla Reservation, and her application was granted, and she selected a separate tract of land, which was allotted to her, and which she has since enjoyed.

The testimony in this case was taken before a special commissioner appointed by the Court, and the Court will note from the transcript of the record that the tesimony of the witness Susan Gangnon on page 124 and of the appellee and her husband on pages 156-7 and Ed Brisbow on page 158 is practically taken *ex parte*.

The referee made his Findings of Fact and reported them to the Court, and they are found on pages 31 to 45 of the transcript of the record, and the exceptions thereto made by the Hon. John H. Hall, United States Attorney, appearing for the appellant, are found on pages 46 and 47, which exceptions we contend were well taken, and upon which we still insist. The exceptions raise combined questions of law and fact, as follows:

I.

That the appellee is not a member of the Walla Walla tribe, and never resided upon the Umatilla Reservation, and therefore is not entitled to any allotment thereon.

II.

That she never settled upon or selected or resided upon the land allotted to appellant, and never had possession thereof, and never requested the allotting commissioners to allot said land to her.

III.

That the appellee afterwards applied for and was allotted upon other lands selected by her, and has ever since occupied and enjoyed the same, and still has the same.

Upon this appeal appellant expects to rely upon the following

ASSIGNMENTS OF ERROR.

I.

Error of the lower Court in over-ruling appellant's demurrer to the bill of complaint, which demurrer raised the questions of insufficiency of facts stated in the complaint and want of jurisdiction of the subject matter. The insufficiency

of the facts in the complaint consisting of a failure to allege residence on the part of complainant upon the Umatilla Indian Reservation at the timeof the passage of the Allotment Act on March 3, 1885,and want ofjurisdiction over the subject matter of the suit by reason of the Act of August 15, 1895, upon which complainant's right is based, not being applicable to the facts in this case, it being prospective in purpose, and not retrospective, and this matter having been settled by the Secretary of the Interior before the passage of such Act, is therefore *res adjudicata*.

II.

Errer in entering a decree herein, for the reason that the United States was and is a necessary and indispensable party defendant herein, and is not a party hereto, the United States being the holder of the legal title to the land in controversy, and trustee, with an active duty to perform, of such land, for the benefit of the allottee.

III.

Error in over-ruling the exceptions to the Findings of Fact made by the special examiner, specified on pages 148 and 149 of the transcript of the record herein.

IV.

Error in decreeing that the report of said special examiner be confirmed, and in setting aside the allotment of the lands in controversy to the appellant herein, and decreeing that said lands be allotted to the appellee, and awarding costs to her.

V.

Error in refusing to enter a decree dismissing plaintiff's Bill of Complaint.

In support of the foregoing contentions we cite the following

POINTS AND AUTHORITIES.

I.

The Act of August 15, 1894 (28 Stat. 305), upon which complainant bases her right to bring suit, is not applicable to cases of this kind, where the decision of the Secretary of the Interior denying her allotment was made before the passage of such Act. Such Act is prospective in charactor, and confers a special jurisdiction where none existed before, and must be strictly construed, and fixed rights cannot be disturbed by it, nor prior decision of officers excercising proper powers be set aside. It relates to the future, and is not retrospective in effect.

Endlich on Interpretation of Statutes, Sec. 209, page 392.

6 Am. & Eng. Ency of Law, 939, 2 Ed.

Farrington vs. Tennessee, 95 U. S. 379.

Chew Heong, vs. U. S., 112 U. S. 536.

Smith vs. Lyon, 44 Con. 175.

Dyer vs. Belfast, 80 Me. 140.

Dash vs. Van Kleeck, 7 Jhon. 477.

Vanderpool vs. Ry. Co., 44 Wis. 663.

Act of August 15, 1894 (Stat. 28,-305)

II.

The Act of March 3, 1885, applies only to the Indians residing upon the Umatilla Reservation at the time of its passage, and then members of the confederated tribes there-

on, and not to persons who came there afterwards seeking allotments, who had never resided there.

Treaty of June 9, 1855 (12 Stat. 945.)

Act of March 3, 1885 (33 Stat. 340.)

Sloan vs. U. S., 85 Fed., 197.

Sloan vs. U. S., 118 Fed. 287, 291-2.

III.

The United States is a necessary and indispensable party defendant herein, being the original source of title, the holder of the legal title, a trustee under a special statutory trust, and the allotting power, with the active duty of protecting the possession of the allottee.

Act of March 3, 1885 (23 Stat. 340, sec. 1.)

Act of August 15, 1894 (28 Stat. 305.)

U. S. Rev. Stats, Sec. 2119.

U. S. vs. Flournoy Cattle Co., 69 Fed. 886.

U. S vs. Mullan, 71 Fed. 682.

22 Ency. Pl. and Pr., 161, and cases there cited.

ARGUMENT.

The first contention on the part of the appellant in this case is that the complaint does not state facts sufficient to constitute a cause of suit against defendant, in that it does not allege that the complainant was a member of the

Walla Walla tribe of Indians, and resided upon the Umatilla Indian Reservation at the time of the passage of the Allotment Act, to-wit: March 3, 1885. The undisputed fact is that neither she nor her mother ever resided upon that reservation prior to 1888. The undoubted purpose of the treaty of 1855, which is pleaded by the complainant, was to make the Umatilla Reservation a permanent home for the confederated tribes and their members, and all Indians who did not accept its terms, and remain permanently upon the reservation, forfeited their rights to the benefits of the treaty. Provision was made by that treaty for this particular section as an exclusive home for the Indians, free from white intrusion, where they were provided with the means of becoming civilized and of learning habits of industry and thrift, and the plain intention was to establish the Indians in homes and have them become permanent residents of such homes. The Act of 1885 provided for the allotment of lands to the Indians *residing* upon this reservation, in accord with the spirit of the treaty, and is only a more elaborate provision for the Indian when he had reached a more advanced stage of civilization. It is limited, both in the title, preamble and in the body of the Act, to the Indians then residing upon the reservation, and under Sec. 5 thereof before it shall be executed in any part the written consent of said Indians signed by a majority of the male adults upon said reservation, and by a majority of their chiefs in council assembled for that purpose shall be obtained and filed with the Secretary of the Interior. As stated in the case of Sloan vs. U. S., 95 Fed. 197. "In view of the situation and the several provisions of the act there may be good ground for holding that only those Indians residing on the reservation when the Act of 1882 was adopted and their after-born children are or can become entitled to allotments under its provisions," and these words are more applicable to the treaty and act regarding the Umatilla Reservation than the Act to which they were applied governing the Omaha Reservation.

By the treaty of 1855 the benefits were only conferred upon those Indians "who removed to and reside upon said reservation," and under its terms all assignments of lands made to families were forfeited by their neglecting or refusing to occupy or till the lands assigned. If, then, the benefits of the treaty were limited to those Indians who became residents of the reservation, and even the rights of such resident Indians were forfeited by roaming from place to place, the true intent of that treaty would seem to be that those Indians who did not comply with its terms were entitled to no privileges upon the reservation, and the complainant and her mother never having availed themselves of the terms of the treaty, then complainant, having never lived upon the reservation until after the Allotment Act was passed and the allotting lists had been prepared, surely could not be such an Indian, even admitting that she were originally of the Walla Walla tribe, which we do not admit. Therefore not having alleged her residence upon the reservation at the time of the passage of the allotment Act, and never having resided upon the reservation until after that time, her complaint is insufficient, and the evidence does not supply facts sufficient to warrant any relief to her.

The decree of the Court of Appeals entered in this case is largely based on the contention that the Secretary of the Interior had an erroneous view of the law when he denied to the appellee an allotment in the first instance, because she was not residing upon the reservation when the commission appointed for that purpose made up the lists of those entitled to allotments. We contend, however, that the Secretary of the Interior was right, and the Lower Court has taken an erroneous view of the law.

Before the complainant in this case is entitled to recover she must first prove that she is entitled to an allotment, and next that she actually settled upon and selected the lands in controversy for her allotment prior to the time the same were selected by the appellant.

In the first instance it is necessary for her not only to prove that she was a member of the Walla Walla tribe of

Indians, but also that she was residing upon the reservation at the time of the passage of the Allotment Act. Neither of these propositions has been proved. The only proof of her tribal relations is the testimony of her husband, who is a squaw man, and married her when she was only thirteen years old, and from that fact alone, aside from his vital interest in the success of her contention, a witness whose testimony must be received with caution. The most, however, that he can say is hearsay testimony of his wife's mother that she was a Walla Walla Indian. This we contend is not competent, to prove her status. Her husband testifies (page 58 of transcript) that his wife's mother claimed to be a Walla Walla Indian, while his wife says (page 81, transcript) that she was half Walla Walla and half Umatilla, and again Susan Gagnon testifies (page 125, transcript) that she belonged to the Wallula or Walla Walla tribes, but does not say which. But the testimony of this latter witness is clearly unreliable, for she says she knew the appellee at the time Dr. Whitman was killed near Walla Walla, and that Mrs. Smith was there then, and that she also knew her mother, and that Mrs. Smith was then small—"just about that size (indicating about three feet)," but the testimony of appellee's husband is that she was thirteen years old when he married her in 1861. If that is so, she was born in 1848, which was a year after the death of Dr. Whitman, who was massacred in Dec., 1847 (Gray's History of Oregon, page 54). This witness does not remember the name of Mrs. Smith's mother, and says that she was pretty small when they left. Certainly little credence can be placed in her testimony.

The whole testimony, then, as to the tribal relations of the appellee amounts to the hearsay testimony of her mother, which was contradicted by the admitted fact that her mother was married to a trapper of the Iroquois race, and travelled from place to place and made her home with him at St. Pauls, near Salem, Oregon, where he died, and where the appellee lived until the fall of 1860, when she went with her family to The Dalles, Oregon, where some of them

had "taken up a ranch" on the Columbia River, and where she lived until coming to the Umatilla reservation in 1888. Upon this showing we contend that there is no evidence that she ever was a nember of the Walla Walla tribe, and the testimony of witness Albert Minthorne and the appellant himself, coupled with the testimony of Mr. Eddy, the allotting commissioner, clearly show that the Indians did not recognize her as a member of their tribe. The fact that Homely and one or two chiefs, according to the testimony of Smith, consented that they should select lands, amounts to nothing in the face of the testimony of the witness, Brisbois, which clearly discloses the fact that for a money consideration these chiefs were willing to comply with the wishes of squaw men in regard to the selection of lands. But the action of the chiefs was not the action of the tribes, and cannot be binding upon this appellant as a member of the tribe.

We maintain, therefore, that the first requisite to a recovery in this case on the part of the appellee is wanting in this; that she has totally failed to prove by competent testimony that she was a member of the Walla Walla tribe of Indians, or that she ever resided upon the Umatilla Reservation prior to the year 1888.

The further fact in evidence that her mother spoke French, German and Chinook and that she herself only spoke French and Chinook and not Walla Walla, clearly shows that she was not a member of that tribe, and there is no evidence that her mother spoke the Walla Walla language, for neither she nor her husband understood that tongue, and could not say whether her husband spoke it or not. These facts we deem to be strong evidence condradicting the claim of the appellee of being a member of the Walla Walla tribe. She was not listed in the original list provided for under the Act of Allotment, and she was never recognized by the Indians in their councils as a member of their tribe or entitled to allotment. She and her husband came, as did many other squaw men from all over the Northwest, to this reservation when they heard the lands were open for allotment

and pitting their keen wits and experience against the ignorance and lack of appreciation of land values on the part of the Indians, endeavored to procure through false and flimsy claims rights to allotments to the most valuable lands upon the reservation, and to displace the resident and ignorant Indians, for whose benefit the Allotment Act was passed.

The only testimony as to the priority of selection on the part of the appellee of the lands in controversy is that of her husband, who acted for her through-out, he being a white man, and having no rights on the reservation.

It is true that she testified that she spoke to the allotting commissioner regarding her case, but when the testimony of herself and her husband is analyzed, it clearly appears, owing to the fact that she could not speak the English language, but only French and Chinook, that all business transactions were done by her husband, and although he claims in his testimony to have requested the allotting commissioners to allot her upon this particular tract of land, the testimony of J. B. Eddy, the only surviving allotting commissioner, (page 140) directly contradicts all his testimony to that effect. Mr. Eddy testifies that prior to the time the lands were alloted to appellant, appellee had never demanded that the lands be allotted to her, and that at the time she was not residing upon these lands, but "just across, on the quarter section immediately south of the quarter section claimed by Hy-yutse-mil-kin," and that the only improvements upon the lands allotted appellant, with the exception of a furrow that was plowed around it, was a "kind of shed—a little shed of some sort; a small affair," and on cross-examination he testifies that she did apply to be listed as an Indian, but their instructions from the commissioners of Indian Affairs were to allot lands to all persons whose names were on the list taken by the listing commission. This testimony is practically corroborated by

Smith and his wife, as Smith says that his wife never lived upon that particular tract, but did "live right across from that, on another piece of land," and as all of the witnesses in referring to the location of the residence of appellee, use the words "across," there was evidently a road running between the two pieces of land.

A close reading of the testimony of Smith will also show that the only improvements placed by him upon the land in controversy was the well he and one Wilson dug, and the small shed referred to by Mr. Eddy, all other improvements having been placed on the northeast quarter of section 29, where his own testimony shows that he lived, while his testimony also shows that he never cultivated the land in controversy, but only used it, in connection with other unfenced lands, for pasturage, while as a matter of fact the entire section of country there was pasturage at that time. He never fenced the land, as is clearly shown by the fact that he only built a line of fence a mile and a quarter long, wheeras two miles would be necessary to fence the land, and that he did not build his fences until after the allotment to the appellant is shown by his claim that he built the fences in conjunction with John Ralston and one McDaniel, who were white men and who purchased lands from the Government under the Act of March 3, 1885, which provided for the sale of said lands upon the Umatilla Reservation as well as for allotments to the Indians, and this sale did not take place until April, 1891. This fact clearly shows that there was no fencing around the land when the allotment was made to appellant, a fact which is also testified to by Albert Minthorne, the appellant himself and Mr. Eddy. The weight of testimony is clearly against the contention of the appellee regarding her priority of selection.

Appellee introduced in evidence, "Exhibit A," found on page 110 of the transcript, being the opinion of the assistant Attorney General of the United States upon an *ex parte* showing made before the Secretary of the Interior by the ap-

pellee, and certainly incompetent for any purpose and being, as we contend in the first part of this argument, an opinion contrary to the Act of March 3, 1885, governing the allotment of lands upon this reservation.

In the first place, it is based upon an eroneous assumption of fact. On page 118 of the transcript in this opinion it is said "The fact they did not reside on the reservation is likewise immaterial, in view of the property right granted them under the treaty of 1855, of occupancy in common with others of any of the lands theretofore occupied by them that were not claimed by private individuals."

The Honorable Assistant Attorney General clearly misconceives the facts in regard to this case upon this point. According to the testimony of the appellee and her husband, she never occupied, after the treaty of 1855, in common with others or otherwise, any of the lands theretofore occupied by the Walla Walla tribe that were not claimed by private individuals, but on the contrary, resided at St. Pauls, in Marion County, Oregon, in an entirely different section of the state, and at The Dalles, Oregon, as stated in the beginning of this brief a point more than 150 miles distant from the reservation, and more than 60 miles distant from the most western boundary of the country occupied by this tribe.

Therefore, we contend that the opinion of the Assistant Attorney General is erroneous, both in its assumption of facts and in its interpretation of the law. The law clearly contemplates that allotments should be made to those Indians *residing* upon the Umatilla Indian Reservation at the time of the passage of the Allotment Act. The mere fact that a few of them were absent from home when the listing commission came upon the reservation is no evidence that they did not reside there, for it is a well-known fact that upon all the reservations in our land during the summer season the Indian residents betake themselves to the mountains, and hunt for game and gather berries.

III.

We further contend, as matters of law;

FIRST:—That the Act of Congress dated August 15, 1894 (29 Stat. 305) has no application to this case, as to so hold it makes said Act retrospective in effect, while its purpose is prospective.

SECOND:—That in all suits of this character the United States is a necessary party defendant.

Prior to the passage of the Act of August, 1894, the sole "power to determine all disputes and questions arising between Indians respecting their allotments" was lodged in the Secretary of the Interior, and by his decision made in 1891 in favor of the appellant's allotment upon the land in controversy this matter was finally determined, and the allotment to the appellant gave him a vested right therein, which can no more be disturbed than can a decision of a Court made under a statute which has been afterwards supplanted by another statute conferring jurisdiction over such matters upon another Court. To hold the Act of August 15, 1894, applicable to this allotment would make the latter retroactive in effect, and, if appellee's contention should prevail, would deprive appellant of his vested right. The reasonable intention of such law is clearly prospective, and, in its language, gives the Courts "jurisdiction to try and determine any action, suit or proceeding *arising* within their respective jurisdictions." This language looks to the future, not to the past; to what is coming, not what is gone. Such being the purpose of the Act, the appelle has no standing in Court, for her claim against appellant is *res adjudicata* by the decison of the Secretary of the Interior, so far as this allotment is concerned, and her claim against the Government for an allotment has been satisfied by other lands selected by and allotted to her.

To give retro-active effect to this statute would open anew all claims to allotments on every reservation, and permit a review by the Courts of all the decisions of the Secre-

tary of the Interior made prior to this Act, would disturb hundreds and thousand sof existing allotments, would make it possible, under these old claims, to contest all sales made by Indian heirs under the Act of May 27, 1902, and would make endless trouble, and fill the United States Circuit Courts with numberless allotment contests,—a result most appalling to contemplate in its far-reaching and injurious effect upon existing rights of the Indians. Congress surely had no intention of reviving old matters, the apparent intention being to provide a legal forum wherein the rights of claimants to future allotments could be adjudicated before the Courts, and the laws under which they were made eonstrued by Judges versed in the law, rather than by executive officers who frequently are not lawyers, and providing a special jurisdiction for the determination of such matters in order that the decisions might be uniform upon the interpretation of such laws. The clear intent being not to interfere with decisions of the Department already made, but only such as might arise in the future. We therefore contend that this Act has no application whatever to this case.

We further contend that the United States is a necessary party defendant herein. Under the Allotment Act of March 3, 1885, the United States becomes trustee for the allottee, and has an active duty to perform in protecting the allottee in his possession of the land, and keeping it free from incumbrances and so conveying it at the end of twenty-five years to the allottee, or his heir. This active duty was exercised by the United States in ousting trespassers from allotments on the Omaha and Winnebaggoe Indian Reservations, in the case of U. S. vs. Flournoy, Cattle Co., 69 Fed. 886, under an Allotment Act similar to the one governing this reservation. Being such trustee the United States was a necessary party defendant, and the only relal defendant. The Act of August 15, 1894, under which appellee brought this suit, surely did not contemplate that suit should be brought against the person alone to whom an allotment had been made by the Government without making

the allotting power, the United States a party. The appellant had no power of allotment, and a decree in a suit against him alone could only determine the rights between the parties to such suit, and not establish any right between the claimant and the allotting power. If it was intended that the United States should not be a necessary party to such a suit, against whom, then, could a claimant bring suit when he had simply been denied an allotment of land by the Secretary of the Interior, which had not been allotted to anyone else? The amendment to the Act of Angust 15, 1894 (Feb. 1901, 31 Stat. 760) makes the claimant as plaintiff and the United States as party defendant the only necessary parties to such a suit, and this amendment is a legislative interpretation of such original Act, practically declaring that the United States is the only necessary party defendant in such suits. As amended, the allottee is not a necessary party under the Act. The language of the amendment is specific and clear. If Congress had considered the amendment as naming an additional party defendant, the words used would have been words of addition, aud not of limitation. Statutes are presumed to guard against fraud and imposition, and especially so in all laws dealing with the rights of the Indians. If the United States is not a necessary party is suits of this character, a wide door is opened for fraud and imposition upon the ignorant Indians by squaw men and unscrupulous persons.

Suits based upon such claims can be instituted against the uneducated blanket Indians as sole defendants, decrees enterred, and allotments cancelled and assigned to the claimant, who may have no rights whatever and under the interpretation of this Act as made by the Lower Court such decree would be binding upon the United States, which holds the land as trustee for the allottee.

Again, by such interpretion fictitious defendants might be used, and unallotted lands secured by claimants possessing no rights to allotment. Making the United States a necessary party defendant closes such door for fraud, protects the allottee, and enables the United States as trustee

to do its duty. We therefore contend that the United States was and is the holder of the legal title herein, and the source from which all title emanates, and as such a necessary party defendant herein, and that no binding decree can be entered until it is made such party defendant, and brought before the Court.

The right to bring such a suit is purely statutory, and dependant upon the Act of August 15, 1894, creating a special jurisdiction for such cases (Sloan vs. U. S., 95 Fed. 197). The right of a Court of Equity to correct mistakes and relieve against frauds and impositions and to give relief in cases where it is clear that the officers of the Land Department had made a mistake in the law on the undispnted facts depriving one of his right, as declared in the case of Shepley vs. Cowan, 91 U. S., 330, has no application to such cases as this, where the legal title to the land in controversy is still in the Government. Such right of a Court of Equity only exists where the legal title has passed from the Government, and not in cases where the Government still holds the legal title under a special statutory trust, as in this instance. The right of action in this case is statutory only, and being for the purpose of securing an allotment from the United States of land owned by the United States and held in trust by the Governmen for the allottee, such suit must be brought against the trustee and party from whom the title is derived; that is, the United States, and not against the equitable claimant under such trustee, who, where there is such claimant, might be a proper party defendant with the United States, but not a necessary one.

We therefore contend, as legal propositions,

FIRST:—That the Act of August 15, 1894, under which claimant instituted this suit, is not applicable to the case in hand, and the Court has no jurisdiction of the subject matter.

SECOND:—That the United States is a necessary defendant and not being before the Court, no binding decree can be entered herein.

THIRD:—That the complaint does not state facts sufficient to constitute a cause of suit, in that it fails to all ge residence by the complainant on the roservation at the time of the Allotment Act, and shows upon its face that her claim for this allotment was decided against her by the Secretary of the Interior in 1891, long prior to the passage of the Act under which she is now suing, and when the sole authority for settling disputes concerning allotments rested with the Secretary of the Interior.

As matters of fact we contend that complainant has failed to prove the allegations of her complaint, in that there is no competent proof of her tribal relations, as alleged, The preponderance of the testimony being against her contention, and no evidence that she ever resided upon the lands in controversy or selected them for allotment prior to the appellant's allotment thereon, and for the further reason that she has since waived all claims whatsoever, by voluntarily selecting other lands and having them allotted to her and entering into the possession and enjoyment thereof.

The importance of the questions to be determined in this case and their far-reaching effect upon the Indians in unsettling the status of their allotments made prior to the passage of the Act of August 15, 1894, makes this a case of great import, and warrants that careful, conscientious consideration of all its phases which we know will be given it by this Honorable Court. Feeling as we do that the interpretation contended for by us of the laws discussed herein is in accordance with the will of Congress in enacting them, we also feel that the best interests of the defendant and all Indian allottees, and the United States and the allotting power and trustee, will be properly protected and justice maintained by such interpretation.

A very careful study of the decisions of the Lower Courts herein impels us to the belief that the arguments herein advanced were not made before the Lower Courts, in which we did not appear, and sufficient consideration was not given to the case as one of such far-reaching import-

ance, and especially so regarding the proper interpretation and application of the laws upon which the complainant bases her claim.

Knowing that every phase of the case as here presented will be most carefully considered by this Honorble Court, we confidently place the cause with it for determination.

Respectfully submitted,

SAMUFL HERRICK
and HAILEY & DOWELL,
for Appellant.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1903.

No. .....

HY-UTSE-MIL-KIN,
Appellant.

vs. (18,824)

PHILOME SMITH,
Appellee.

BRIEF OF APPELLEE.

In order to determine the issues in this suit it will be necessary to review the treaties and laws of the United States relating to and affecting the Indians now residing upon the Umatilla Indian Reservation in Umatilla County, State of Oregon.

TREATY.

On June 9, 1855, a treaty was made and concluded between Isaac I. Stevens, Governor and Representative of Indian Affairs for the Territory of Washington, and Joel

Palmer, Superintendent of Indians occupying lands partly in Oregon and partly in Washington Territory, on the part of the United States, and the Walla Walla, Cayuse and Umatilla bands of Indians.

That treaty was ratified by the United States Senate March 8, 1859, and was proclaimed April 11, 1859.

Article 1, ceded all the lands then claimed by said Indians to the United States, but provides that a certain described tract "be set aside as a residence for said Indians, which tract for the purposes contemplated, shall be held and regarded as Indian Reservation," and all of which tract "shall be set apart and, so far as necessary, surveyed and marked out for their exclusive use." That no white person was to be permitted to reside upon the same without permission of the agent and superintendent. The said Indians agreed to remove and settle upon the same.

Article 2, provides for the payment to the Indians of various sums of money.

Article 3, provides for expenditure by the United States of a large sum of money for buildings, etc., on the reservation.

Article 4, provides for the erection on the reservation of certain mills, shops, etc.

Article 5, provides for the building of dwelling houses, etc., for the chiefs of the three tribes.

Article 6, provides that the President may from time to time at his discretion, cause the whole or any part of the tract to be surveyed and assigned to each of the said Indians as may desire to locate thereon.

Article 7, provides that the annuities of the Indians shall not be taken to pay the debts of individuals.

Article 8, provides that the confederated bands acknowledge their dependence on the government of the United States.

Article 9, provides against the evils of intemperance among the Indians.

Article 10, provides for roads, highways and railroads.

Article 11, provides for the going into effect of the treaty.

Under the said treaty the United States, soon after it was ratified by the Senate of the United States, proceeded to establish said Indians upon said reservation, and has ever since maintained the same upon said reservation.

ACT ADMITTING OREGON AS A STATE.

On February 14, 1859, Congress passed an act admitting Oregon as a state, in which act no reference is made to any Indian reservations, neither is there any provision in the Constitution of the State of Oregon reserving to the United States the jurisdiction of Indians or of Indian reservations.

ALLOTMENT ACT.

On the 3rd day of March, 1885, Congress passed a law applying to this reservation (23 Stats. L. 340) allotting certain lands of this reservation to the individual members of the respective tribes.

That act provides that the President of the United States shall cause lands to be allotted to the confederated bands of Cayuse, Walla Walla and Umatilla Indians residing upon the Umatilla Indian Reservation out of agricultural land as follows:

"To each head of a family 160 acres, etc."

"*Allotments to heads of families and to children 18 years of age belonging to families shall be upon the selection made by the head of the family, etc.*"

Before any allotments are made, a commission of three disinterested persons, to be appointed by the President, shall go upon said reservation and ascertain, as near as may be, the number of Indians who will remain upon said reservation, and who shall be entitled to take lands in severalty thereon, and the amount of land required to make the allotments; and thereupon such commission shall determine and

set apart so much of said reservation as shall be necessary to supply agricultural lands for allotments in severality, etc. Said commission shall report to the Secretary of the Interior the number and classes of persons entitled to allotments, as near as they may be able to, etc."

"That before this act shall be executed in any part the consent of said Indians shall be obtained, etc."

"That the Secretary of the Interior shall have power to make needful rules and regulations to carry into effect the provisions of this act, etc."

In 1894, Congress passed the following law, viz:

"That all persons who are in whole or in part of Indian blood or descent who are entitled to an allotment of lands under any law of Congress, or who claim to be so entitled to land under any allotment act, or under any grant made by Congress, or who claim to have been unlawfully denied or excluded from any allotments or any parcel of land to which they claim to be lawfully entitled by virtue of an act of Congress, may commence and prosecute or defend any action, suit or proceeding in relation to their rights thereto, in the proper circuit court of the United States, and said circuit courts are hereby given jurisdiction to try and determine any action, suit or proceeding arising within their respective jurisdictions, involving the right of any person, in whole or in part of Indian blood or descent, to any allotments of lands under any law or treaty."

"And the judgment or degree of any such court in favor of any claimant to any allotment of lands shall have the same effect as if such an allotment had been made and approved by him." (Sup. Rev. St. Vol. 2, Page 246).

From the evidence in this case and the pleadings the following questions of law are presented:

FIRST:—Was plaintiff entitled to the allotment upon the Umatilla Indian Reservation?

SECOND:—Did the act of taking possession of the land and improving it and notifying the commission constitute

a selection as contemplated by the act of congress March 3, 1885.

THIRD:—Did such a selection give a prior right to the appellee to have the land thus selected, occupied and improved by her, allotted to her?

Primarily the first question was an *ex parte* question in which the appellant was not and could not be at all interested, but which interested the appellee on the one side and the Indians or the Government of the United States, which represented the Indians as a whole, on the other. This question was tried out and determined in the Department of Indian Affairs, and resulted in the said department deciding and holding that the appellee and her children were Indians and were entitled to an allotment upon the said Umatilla Indian Reservation, and from the evidence taken before the Master, and the facts found and reported, taken together with the facts found and decided by the department, no court can come to any other conclusion than that the appellee in this case was an Indian woman of full blood, and was a member of the Umatilla band of Indians and was residing upon the Indian reservation at the time the allotments were made, and that the evidence, and the findings of the Master and the court below bring her under all the requirements of the act of March 3, 1885, giving her and her children a right to such allotment, and that she was so recognized and admitted to be so entitled by the Indians residing upon the Umatilla Indian Reservation themselves and by the United States agent in charge of said reservation. The Interior Department has so held in this case, *ex parte*.

"Contemporaneous construction of a statute by the Executive Department charged with its execution is entitled to great weight and ought not to be overturned unless clearly against the intention of Congress."

U. S. vs. Philbrick, 120 U. S. 52.

U. S. vs. Johnson, 124 U. S. 236.

And in particular as to who are Indians the Courts follow the decisions of the Department:

U. S. vs. Holladay, 3rd. Wall 419.

In re Kansas Indians, 5th. Wall 737.

U. S. vs. Boyd, 68 Fed. 560.

U. S. vs. Higgins, 103 Fed. 348.

Farrell vs. U. S., 110 Fed. 942.

Whether she was a Umatilla Indian in blood or not is immaterial so long as she was an Indian woman in whole or in part born within the United States and was recognized by them as one of their number.

Sloan vs. U. S., 95 Fed. 193.

U. S. vs. Higgins, 103 Fed. 348.

The second question is, did the appellee select the lands in controversy prior to the selection and allotment to the appellant.

The correct answer to this question depends upon the proper understanding of the word "selection," and the meaning of that word as used in the act of Congress of March 3, 1885. Under that law all allotments had to be made upon the "selection" of some person. The allotting commissioners had no power to make selections. That act was left to the Indians themselves in all cases, except orphans, in which case the agent in charge of the reservation was authorized by the act to make the selection for them. Now the word "selection" is defined to be anything selected, chosen, picked out of a number; (Century Dictionary). Therefore, in this statute it means certain described tracts of land chosen, selected or picked out of the numerous other tracts of land upon the

Umatilla Indian Reservation by the person authorized by the act so to do. The statute does not in terms define what a selection must consist of or when it shall be made. A tract of land is selected when it is designated or set apart for any particular purpose.

In re Henkel, 2 Saw 305.

Hence the question of selection is one of fact to be determined from the evidence in the case.

The evidence in this case shows conclusively, and is not disputed in any manner, that the appellee in this case, five years or more prior to the allotments upon the Umatilla Indian Reservation, went upon this tract of land and selected it, chose and picked out of the other tracts of land upon the Reservation as the land which she desired to be allotted to her as her individual portion of the Umatilla Indian Reservation. This she did under the guidance and the approval of the Indian Chief Homily, who was cheif of the Walla Walla band of Indians at that time, and with the knowledge and approval of the United States Indian agent then in charge of the Umatilla Indian Reservation. She not only selected or chose it but as the evidence of that selection and choosing she took actual possession of it, first, by plowing a furrow around it, and then by enclosing it with a substantial fence, and otherwise improving it in connection with the lands which she selected at the same time for her minor children, and then when the allotting commissioners arrived, she properly notified them of her selection, and they refused to allot her, and thereupon the Department at her instance made a thorough examination into the matter and into her rights upon the said reservation, and after an investigation decided at first that she was not entitled to an allotment at all, but afterwards upon reconsideration and a more thorough investigation of the facts and of the law the Department decided that *She and her children were entitled to allotments upon the said reservation, but that her prior selection*

and improvements upon the land did not give her any prior right or equity in or to the land thus alloted, which conclusion we think is not only a very erroneous one but a very unjust and inequitable one. If appellee was entitled to an allotment and knowing that and for that purpose selected this land, fenced it and improved it to the extend of $500.00 or $600.00, what rights and jurisdiction had the allotting commissioners to take that land and give it to some other person, who must have had notice of her claim? What right had the appellant to select that land when it was in the actual possession of appellee? The allotment act did not give the appellant the right to select the appellee's land, and the allotment commissioner had no authority to determine which of the claimants was entitled to it, because under the law as it then stood that was the province of the Secretary of the Interior (act of March 3, 1885) but the commission usurped that authority and arbitrarily allotted the land to the appellant, and the duty of determining the matter was devolved upon the court by act of Congress, and we claim that the appellee is entitled, under the act of March 3, 1885, and under the act of August 15, 1894, to have this matter determined in the first instance by the Circuit Court of the United States for the District of Oregon, and as a matter of law the appellee claims that her selection and actual settlement and possession of the premises gives her a superior and equitable right to said premises.

POINTS.

It is a well founded principle of law that when one person is in the actual and peaceable possession of government land no other can obtain a superior right thereto. This is a principle that has been applied in all classes of public lands under all laws even to Indian lands and was first announced in the leading case of

Atherton vs. Fowler, 96 U. S. 513.

which has been cited and approved in many different kinds of cases, and among them are

Hosmer vs. Wallace, 97 U. S. 575.

Quimby vs. Coulen, 124 U. S. 423.

DelMonte vs. Last Chance, 171 U. S. 32.

Tustin vs. Adams, 87 Fed. 360.

U. S. vs. LaChappelle, 81 Fed. 152.

By referring to appellee's "Exhibit A" (Record Page 110) the Court will find that the Department found all the facts in this case to be the same as those found by the Master, except as to the value of the improvements, but the Honorable Secretary of the Interior held in his decision as a conclusion of law that the prior possession and improvements of the appellee's did not give her any superior equities, which, as a conclusion between the government and the trespasser or a mere settler without any rights, may be correct, but as between two claimants of public lands of any kind or nature, it has long been an established rule of law that the first in time is the first in right.

Shepley vs. Cowen, 91 U. S. 330.

Worth vs. Branson, 98 U. S. 118.

McCreery vs. Haskell, 119 U. S. 327.

Aside from all the above authorities we claim that the plain reading of the statute (Act. March 3, 1885) gives the appellee superior equities because it was evidently the intention of Congress to put the Indians in a position whereby

they might protect their possessions, their homes and their families. The heads of families were authorized and empowered to make their selections, and the law in its scope and effect is very like the homestead law, and the allottees are to be regarded very much as homesteaders.

State vs. Norris, 55 N. W. R. 1086-1089.

The first assignment of error is that the Court erred in overruling the appellant's demurrer, which was a general demurrer, to the sufficiency of the complaint and to the jurisdictio. of the Court over the subject matter of the suit. (See Page 14 of Record).

Excepting for the act of Congress of August 15, 1894, (28 Stats. 305) which is quoted above *in extenso* this demurrer would have been well taken because prior to that enactment the Executive Department of the Government would certainly have exclusive jurisdiction of all matters concerning the land in question, but the law was passed for the express purpose of changing that state of affairs and for providing a remedy in the courts for just this class of cases.

Sloan vs. U. S., Supra.

There is no contention that the complaint does not bring the appellee within the provisions of that act, hence there was no error in overruling the demurrer.

The second assignment of error is to the first finding of fact by the Commissioner, which is to the effect that the appellee is a full blood Indian woman and a member of the Walla Walla band of Indians, and resides upon the Umatilla Indian Reservation, (See Page 32 of Record); and the evidence to support that finding of fact is direct, positive and is not controverted by any other evidence. (See W. A. Smith's testimony Pages 58 and 59 of Record). (Mrs. Philomme Smith Page 81 of Record). (Charles Chalifoe Page 94 of Record). (Susanne Gagon Page 125 of Record). This evi-

dence also shows conclusively that the appellee was not only a full blood Indian woman, but that she and her mother were connected by blood with the Walla Walla and Cayuse Indians and there is no evidence disputing or tending to dispute this much of the finding.

Being of Indian blood, whole or mixed, and born within the United States, it is of no importance as to what tribe or band she sprung from. She might have been a Sioux or Ponca or California Digger Indian so long as she was an Indian woman in whole or in part and actually belonged to either of the tribes or bands of Indians located upon the Umatilla Indian Reservation. This proposition is fully settled by authorities.

Sloan vs. U. S. 95 Fed. 193.

U. S. vs. Higgins, 103 Fed. 348.

That being true it only remains to ascertain whether she was a member of the Walla Walla, Umatilla or Cayuse bands of Indians, and of this there can be no question because the evidence is clear and undisputed, and as we claim is settled by the Indian Department of the United States after the most careful and searching investigation as to all the facts leading up to the question (See Record Pages 111 to 120 inclusive). But aside from this finding and determination the evidence establishes the fact absolutely that Homily and Showaway, the chiefs of the Walla Walla and Cayuse bands of Indians recognized Mrs. Smith and her children as Indians belonging to their bands and permitted them to reside upon the reservation with them and pointed out and directed her to the place where to select the land for her allotments, including the land in controversy, and at the same time the then United States Indian agent acquiesed and also assisted the appellee in selecting her said land. (Record Pages 60 and 90).

These facts being true and undisputed the question as to whether or not Mrs. Smith is an Indian woman belong-

ing to the Umatilla Reservation and entitled to allotment under the act of March 3, 1885, should be considered settled by the decision of the Department.

The third specification of error is not supported at all except by the uncorroborated evidence of the appellant and he is controverted by the testimony of the appellee, her husband and Brisbois, and therefore, the weight of evidence is clearly with the appellee, and this Court must sustain this finding under the rule that when the evidence is conflicting the appellate court will sustain the findings of the Master or Referee in Chancery.

Nessley vs. Ladd, 29 Or. 354.

Judge Bellinger so held in his opinion in this case and that is the general rule followed by all the appellate courts.

The fifth, sixth and seventh assignments of error allege error in the Court overruling the appellant's exceptions to the twelfth, thirteenth and fifteenth findings of fact. Each one of these findings are supported by the undisputed evidence, not only of the appellee and her witnesses, but that of Mr. Eddy, one of the witnesses for the appellant, who was one of the commissioners who was on the ground at the time the allotment was made to the appellant.

The eighth specification is that the court erred in decreeing that the report of C. H. Carter, special examiner in Chancery be confirmed.

This is a general specification covering all the assignments of error. If there is no error in any of the particular findings objected to, and to which exceptions were made, there certainly could be no error in sustaining the findings as a whole. But if there is error in any of the particular specifications then to that extent would there be error in sustaining the report as a whole, and as we have pointed out to the

Court that each assignment taken is not well founded, there is no necessity of considering this specification. In fact it is no assignment of error.

The ninth, tenth and eleventh assignments of error are entirely superfluous inasmuch as matters therein objected to depend entirely upon whether or not the Court had jurisdiction in this case and of that there can be no doubt since the statute is explicit, and this matter of jurisdiction was fully discussed under the demurrer. But we will add here that this action is purely statutory and whether or not the Court has jurisdiction depends upon whether or not we have brought our appeal within the requirements of that statute, and of that there can no doubt.

If the Court has jurisdiction to determine whether or not the appellee is entitled to the land in controversy as her allotment it certainly has jurisdiction to require anything to be done, or not to be done, necessary to enforce its decree and protect it. The court has that power inherently.

The twelfth specification of error is that the court erred in rendering any decree because the United States of America was a necessary party. This point was first raised in the Court of Appeals and was not argued or presented to the lower court, and the argument presented to sustain that contention seems to us to be very futile. The only fact upon which it can be based is that the legal title to the land in controversy is in the United States, and that the United States is an express trustee, which fact might ordinarily in ordinary actions or suits if the parties were all private individuals and the action not one peculiarly statutory requiring that the trustee should be made a party in order to settle the whole case at one time, but in this case the Government, which is the trustee holding the legal title in trust is not only the trustee but is the soverign power and cannot be made a party without its consent, which, at the time this suit was brought, had not been obtained or provided for by any act of Congress, but Congress had provided a way for this matter to be adjudicated so that it could be bound by the decree.

The act under which this suit was brought provides that a decree may be filed with the Secretary of the Interior, and when so filed it shall be binding upon the Government. (See act of August 15, 1894).

In the court below District Attorney Hall in his brief and argument undertook to limit the purview of the statute under which this suit was brought within very narrow limits claiming that it was not the intention of Congress to include such cases as this, but that it was intended only to establish allotments claimed by individual Indians to which they had been denied by the Government and which had not been allotted to any other Indians. This contention was based upon the fact that section six of the allotment act of 1885 conferred jurisdiction upon the Secretary of the Interior, and that the same was not repealed by the act of 1894. That until patent had issued the Department of the Interior had exclusive jurisdiction, hence the action or suit was prematurely brought. This contention of Mr. Hall is refuted by the express terms of the act itself and the decision of Judge Shiras in (Sloan vs. U. S., Supra) is clearly against him. Section six of the act of 1885 is not repealed by the act of 1894, but the intention of Congress in that act was doubtless to confer upon the Courts paramount and exclusive jurisdiction to the same extent as they would have had, had patent issued.

We introduced a certified copy of the decision of the Secretary of the Interior to prove what facts had been established by the Department in Mrs. Smith's case to cover the rule that generally the courts are bound by the facts as found by the Department. That decision was in a proceeding between Mrs. Smith and the Executive Department and was made after a thorough investigation wherein much evidence was taken and was only *ex parte* as to Hy-utse-mil-kin. The Department found and declared Mrs. Smith to be an Indian woman and entitled to an allotment upon the Umatilla Indian Reservation, and that was a conclusion entirely between her and the Government, which has been settled in her favor.

The only question in this case is whether she had selected these lands prior to the selection made by Hy-utse-mil-kin, upon which point the Department also found in her favor, but it said that it gave her no superior rights or equities to this land, but we contend that the possession of Hy-utse-mil-kin in this case is that of a holder of the legal title as trustee for Mrs. Smith, and his allotment should have been her allotment.

In the argument before the Court of Appeals, District Attorney Hall contended that the marriage of Mrs. Smith with a white man and a citizen of the United States changed her status as a tribal Indian, and constituted her a citizen of the United States, entitled to all rights and privileges as such by reason of which she could claim no rights as a member of the Indian tribes.

Excepting for the act of Congress August 9, 1888 (Sup. R. St. 2nd Ed. Ch. 818 and 608) the point might be well taken, but that act expressly provides that such a marriage shall not deprive the Indian woman of her rights as a member of the tribes.

We most respectfully submit this case to this Honorable Court.

R. J. SLATER AND J. T. HINKLE,

ATTORNEYS FOR APPELLEE.



IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1903.

NO. _____

HY-UTSE-MIL-KIN,
Appellant.

vs. (18,824)

PHILOME SMITH,
Appellee.

REPLY BRIEF OF APPELLEE.

I.

It is now urged by counsel for the appellant that the complaint in this suit does not state facts sufficient to constitute a cause of suit for the reason that it does not allege that the claimant was residing upon the Umatilla Indian Reservation on the 3rd day of March 1885 the date when the Act of Congress, under which the allotments were

made, was enacted. This is the first time in the trial of this case, that this point has been raised but it was fully considered by the Department of the Interior while it was pending there, and after very careful and repeated examinations the Departmen held that the Act did not require the allottees to have been actually residing on the reservation at the time. That such a conclusion was correct seems very obvious in the light of the opinion of Assistant Attorney General, Wm. Little. (See printed record pages 112 to 120).

The Act of 1885 must be construed in convention with the original treaty with the Indians and this Court must answer that it was passed with a perfect knowledge and understanding of the treaty and the manner of its enforcement by the Government, and also with a full knowledge of the location and residence of the Indians.

The Department decided and held that under the treaty of 1855 the individual Indians had a right to occupy with others any of the public lands theretofore occupied by them. That construction of the treaty is undoubtedly correct. In fact it is the exact language of the treaty. But the reservation was to be the residence place of the bands of Indians to the complete exclusion of the whites. The Act uses the word "residing" as the verb following the noun bands. It refers to the bands and not to the individual Indians composing the band. The language of the Act does not say expressly or by implication that the allotments must be made only to those residing on the reservation at the time the Act took effect. The evident true meaning is that any individual member of either of the bands LOCATED upon the reservation should be allotted. As shown by the decision of the Department above referred to, when the commissioners appointed to carry the Act into effect, went upon the reservation they found the greater part of the Indians residing off of it and messengers were sent out all over the country to tell them to come in, and be enrolled and to select their lands. Evidently Congress intended that the allottees should be residing on the reservation at the time they were allotted. Had Congress intended to confine

the allotments to those residing on the reservation at the time of the passage of the Act it would have said so in unequivocal terms: it would have used some expression like this, "residing upon the Umatilla Reservation, in the State of Oregon at this time" or "when this Act takes effect." Or it would have provided that no Indian now residing off the reservation shall be entitled to allotment.

Upon this point this case in very similar to the case of Sloan vs. United States 118 Fed. 283.

In that case the Court construed the 5th section of the Act of 1882 (22 Stat. 341) which is as follows: "That with the consent of said Indians as aforesaid, the Secretary of the Interior be and is hereby authorized, either through the agent of said tribe or such other persons as he may designate to allot the land lying east of the right of way granted to the Sioux City Nebraska Railroad Company, under the agreement of July 27, 1880, approved by the Acting Secretary of the Interior July 27, 1880, in severalty to the Indians of said tribe."

The counsel for the United States in that case claimed that the allotments under that Act and under that section of the Act should have been actually residing on the reservation at the time the Act was passed and judge Shiras, in passing upon the question says "A liberal construction should be given the Act, in order, to effectuate its purposes, which was to encourage the Indians to break up the tribal relations and adopt the habits of civilized life; and persons of mixed blood, who, although not living on the reservation, were recognized by the tribe in council or the equivalent, may properly be given allotments, but on the question whether they have been recognized the Courts will follow the ruling of the land department."

Now these are the undisputed facts in the case at bar,

FIRST:—Philome Smith, the plaintiff and appellee is a full blood Indian woman.

SECOND—She was born within the United State at or near what is now known as Wallula in the state of Washington.

THIRD—Her mother was an Indian woman belonging to the Walla Wall band of Indians, and her father was an Iroquois Indian at the time in the employment of the Hudson Bay Company.

FOURTH—Mrs. Smith and her mother never left the Oregon Country but remained in that part of the country where she was born and, in the Willamette Valley all their lives.

FIFTH—On the 10th day of January 1861 she was married to F. A. Smith, a white man, at The Dalles, Oregon at or near which place she resided with her husband until the spring of 1887 when she and her husband and family moved upon the Umatilla Indian Reservation.

SIXTH:—They settled upon the reservation, by the permission and authority of the United States Indian Agent there in charge of the reservation; at the instance and solicitation of the cheif of the Walla Walla band of Indians and with the approval of at least one council of the Indians.

SEVENTH:—Some five years prior to the allotment, she selected the land in dispute, as her allotment and in doing so had the aid and assistance of Homily, the cheif of the Walla Walla band, and the approval of the agent.

EIGHT:—At the time she made the selection the land was unoccupied and she immediatley took possession of it and improved it to the extent of seven or eight hundred dollars.

NINTH:—She was in actual possession of the land in 1891 and 1892 when these allotments were made.

TENTH:—She went to the commissioners and asked to have the land allotted to her and they refused her because she had not been enrolled.

ELEVENTH:—Soon after she came upon the reservation she made application to be enrolled and the matter was

pending in the Department at the time the allotments were made.

TWELFTH:—The allotting commissioners disregarded her claims and allotted the land to the appellant.

THIRTEENTH:—In the contest which followed the Department of the Interior decreed that the appellee was entitled to an allotment, upon the Umatilla Reservation, but that her prior selection, settlement, possesion and improvements did not give her a prior right or equity in the land.

(For these findings see printed record pages 112 to 120.)

The counsel for the appellant also contends that the Act of August 15, 1894, is prospective and does not apply to cases of this kind, and that it relates to the future and is not retrospective in effects.

That point is clearly untenable and is not sustained by any of the authorities cited.

The rule is that all remedial legislation shall be liberally construed; particularly should this be so where new remedies are given, and with reference to the bestowal of jurisdiction on the Courts.

Larkin vs. Saffarans, pur Hammond J. 15 Fed. Rep. 150.

Galveston etc. R. Co. vs. Cowdry 11 Wall, U. S. 459.

U. S. vs. Burchard 125 U. S. 176.

Pugh vs. McCormack 14 Wall, 361.

Untermeyer vs. Freund 58, Fed. 205.

Stephens vs. Cherokee Nation 174 U. S. 445.

Crook vs. U. S. 138, U. S. 157.

McBurny vs. Carson 99, U. S. 567.

Larkin vs. Saffarans, 15 Fed. 147.

Harvey vs. Lord, 10 Fed. 238.

Congress had a right to take away the jurisdiction, which originally rested with the Secretary of the Interior and confer it upon some other tribunal.

Emblem vs. Lincoln Land Co., 94, Fed. 710.

Gordon vs. U. S., 7 Wall 188.

The intention of Congress in passing this law was remedial.

Sloan vs. U. S. 118, Fed. 283, (read page 290) and being remedial may be retrospective.

1 Kents Com. 455. If so, and if the appellant had vested rights, which we do not admit, such vested rights if any vested subject to the equity existing against them, and which the statute recognizes and enforces, 1 Kent Com. 466.

Goshen vs. Sonington 4 Conn. 209.

Wilkins vs. Leland 2 Peters 627.

Langdon vs. Strong, 2 Venwert 234.

Watson vs. Mercer, 8 Peters 88.

Remedial statutes, although retroactive, are construed liberally to accomplish the object, correct the evils and suppress the mischief aimed at.

6 Am. and E. Ency of L. 937.

As to the third point argued in the brief for appellant, to-wit: that the United States is a necessary party, we simply desire to call attention of the Court to the fact that this suit was commenced under the Act of Aug. 15, 1894 and that did not provide or require that the Government should be a party defendant and at that time there was no way provided for the bringing in the Government as a party defendant and it was not necessary because the Act itself provided that the Government should be bound by the proceedings between the parties, upon being certified to the Secretary of the Interior. The point is fully met by the decision of the Court of Appeals.

Where a right exists it is in the power of the legislature to provide a remedy.

6 Am. and E. Ency of L. (2nd) 946.

The Act of Congress of Aug. 15, 1894 effects the remedy and not the vested rights of either party. There is no vested right in a remedy.

6 Am. E. Ency of L. (2nd) 947.

Most respectfully submitted,
R. J. SLATER & J. T. HINKLE,
Attorneys for Appellee.

Su

Hy-Y

Thi
the C
appell
officer
vation
pellee.
iner t
Court
affirm
lant t

The
(befor
amend
lee is
growa
Walla
Senat
(12 S

A c
did n
was o
rial a

Wi
repor
the C
the fo
blood
and i
reside
defen
reserv
act o

Supreme Court of the United States.

No. 209.—October Term, 1903.

Hy-Yu-Tse-Mil-Kin, Appellant, vs. Philomme Smith. } Appeal from the United States Circuit Court of Appeals for the Ninth Circuit.

[May 16, 1904.]

This is a suit in equity brought by the appellee, complainant below, in he Circuit Court of the United States, District of Oregon, against the ppellant, to obtain the cancellation of an allotment of land made by the fficers of the government to the appellant, on the Umatilla Indian reser- ation in Oregon in 1891, and to have the land allotted to her, (the ap- ellee.) Issue being joined in the case, it was referred to a special exam- ner to ascertain and report the facts, and upon his report the Circuit ourt gave judgment in favor of appellee, (110 Fed. 60,) which was ffirmed by the Circuit Court of Appeals, (119 Fed. 114,) and the appel- ant thereupon appealed here.

The action was brought pursuant to the authority of an act of Congress before amendment) passed in 1894, chapter 290. (28 Stat. 286, 305; mended, 31 Stat. 760.) The right to the allotment claimed by the appel- e is based on the act of March 3, 1885, chapter 319, (23 Stat. 340,) and rows out of the treaty of June 9, 1855, between the United States and the Valla Walla and other Indian tribes, which treaty was ratified by the enate, March 8, 1859, and proclaimed by the President, April 11, 1859. 12 Stat. 945.)

A demurrer to the bill was filed by the defendant on the ground that it id not state facts sufficient to constitute a cause of action. The demurrer as overruled and the defendant then answered denying many of the mate- ial allegations in the bill.

Witnesses were examined before the special examiner and he made a eport and findings of facts, which findings were subsequently adopted by he Circuit Court and by the Circuit Court of Appeals. Among others he following facts were found: The appellee, Philomme Smith, is a full- looded Indian woman, and at all times mentioned in the complaint was nd is now a member of the Walla Walla band or tribe of Indians, and esides upon the Umatilla Indian reservation in the State of Oregon. The efendant (appellant) is also a full-blooded Indian residing upon the eservation. Pursuant to the authority granted by the above-mentioned ct of March 3, 1885, the President appointed commissioners for the allot-

ment of lands on the Umatilla reservation, and the commissioners carried out the duty devolved upon them by the President under that act and completed the allotments on or about April 1, 1891, but refused at that time to make any allotment to the appellee, because of her absence (although but temporary) when the commissioners made a census of the Indians entitled to allotment. At the time the other allotments were made the appellee was the wife of W. A. Smith, a white man, and she was also the real head of the family, which consisted of the husband, his wife and their eight children. The parties were married January 16, 1861, and the appellee has been recognized by the Interior Department as the head of the family in the sense mentioned in the act of Congress of 1885.

At the time the allotments were made to the other Indians by the commissioners, as above mentioned, appellee was located and actually residing with her family upon the reservation upon a large tract of land, some five hundred and sixty acres, including the land in controversy herein, and she and her family at that time were living in a house about twenty steps from the boundary line of this particular 160 acres. The land (including the 160 acres) was enclosed in one body by having a furrow plowed around the same, marking it off from the other adjacent land. The appellee had selected the land in 1888, and with her family was then in possession thereof, and retained such possession until the fall of 1896, with the consent of Homily, chief of the Walla Walla Indians, and Show-a-way, chief of the Cayuse Indians, and also with the consent of ——— Coffee, who was at that time acting as Indian agent upon that Indian reservation.

Since 1888 and prior to the time when the allotment to defendant was made the appellee made valuable improvements upon and around the land in question, by building upon it a small cabin and a barn and making other improvements, and by putting a wire fence around the whole tract, the whole cost amounting to between $700 and $775, and from April, 1888, until the fall of 1896, long after the allotments were made by the commissioners, the appellee and her family had possession of the land in question with the improvements thereon, and she and her family continued to live during that time in the house, about twenty steps from the boundary line of this land. When the appellee left the land in the fall of 1896 she left it because she was ordered to do so by the then Indian agent, pursuant to a determination by the Interior Department, made in 1893, that she was not entitled to any allotment under the act of 1885.

Before the land was allotted to the defendant and while the allotting commissioners were engaged in allotting lands in 1891, as above stated, the appellee asked to be allotted the particular 160 acres in controversy in this case by the commissioners, but they declined to do so because her name was not upon their allotting list. The defendant obtained possession of the 160 acres in October, 1896, and the land was allotted to him

at that time, when appellee was ordered off the same by the Indian agent, and the defendant has never paid the appellee any money or in any manner reimbursed her for the improvements which she had made upon the lands in controversy, and the defendant had made no improvements thereon, and was aware of all that had been done by appellee when he made the selection of this land and when it was allotted to him. There is neither allegation nor proof that appellant has since made any improvements on the land.

In April, 1897, the Department of the Interior reconsidered its former decision, and held that appellee was entitled to an allotment of land upon the reservation, and it directed one G. W. Harper, the then Indian agent of that Indian reservation, to make an allotment to her, and, pursuant to that direction, Harper called upon her to make a selection of lands for her allotment, and she thereupon selected certain lands, which were not the lands in question, the land selected amounting to 146.2 acres in all, and she was recognized by the department as the head of a family entitled to make selection and have an allotment. A part of this land she has since leased to a tenant and has accepted rental from the tenant, the lease covering only 70 acres.

The land selected by the appellee after she had been forced to relinquish the possession of the 160 acres was not as valuable as the land from which she was ordered, and at the time the selection of this other land was made by her she and her husband came to the office of the Indian agent and asked him if it would affect her rights in the land in question for her to select land as directed by the Indian commissioner. She was told by the agent that he thought it would not; that she was under orders from an officer, and not under her own free will, when she left the land, and it was taken possession of by the defendant, and with that understanding the appellee made the selection of the other and less valuable land.

The particular relief asked by the appellee in her bill was a decree declaring her "to be the allottee upon the said tract of land, and that the allotment thereof to the defendant be cancelled and annulled, and that the defendant, his servants and all persons holding under him, as tenants, lessees or otherwise, be forever enjoined from interfering with your orator's possession thereof, and that she may have judgment against the defendant for damages," &c.

Mr. Justice PECKHAM, after making the above statement of facts, delivered the opinion of the Court.

The first objection made by counsel for the appellant is that the act of Congress of August 15, 1894, (28 Stat. 286, 305,) under which the complainant instituted this suit, is not applicable to this case, and, therefore, the court has no jurisdiction of the subject matter. The objection made

by the appellant is, that to make the act applicable to the appellee would be to give it a retrospective effect, while its purpose is plainly prospective. The objection is untenable.

The appellee claims that under the act of 1885 she was entitled to an allotment of land in the Umatilla reservation, and that it was improperly refused her. The act provides (p. 305): "That all persons who are in whole or in part of Indian blood or descent, who are entitled to an allotment of land under any law of Congress, or who claim to be so entitled to land under any allotment act or under any grant made by Congress, or who claim to have been unlawfully denied or excluded from any allotment or any parcel of land to which they claim to be lawfully entitled by virtue of any act of Congress, may commence and prosecute or defend any action, suit or proceeding in relation to their right thereto in the proper Circuit Court of the United States."

That this act embraces the case of a person situated, as was the appellee at the commencement of this suit, seems to us so plain as to require no further argument. It is not in any way a retrospective operation which is thus given to the act, except as it applies, by its language, to any one who was then (at the time of the passage of the act of 1894) entitled to an allotment. She claims that she was so entitled to an allotment of the land in question, and that it had been improperly allotted to defendant (appellant), and that the act permits her to assert her claim in the Circuit Court, as against the appellant, and to have it adjudged between them. We have no doubt she has that right.

The next objection is that the complaint does not state facts sufficient to constitute a cause of action, in that it fails to allege the residence of the complainant (appellee) on the reservation at the time of the passage of the allotment act (1885), and shows upon its face that her claim for this allotment was decided against her by the Secretary of the Interior in 1891, long prior to the passage of the act of 1894, under which she is now suing, and when the sole authority for settling disputes concerning allotments resided with the Secretary of the Interior.

We are of opinion that it was not necessary to allege or prove the residence of the appellee on the reservation at the time of the passage of the act of 1885, called the "Allotment Act." That act had reference, as its preamble states, to the "Confederated bands of Cayuse, Walla Walla and Umatilla Indians, residing upon the Umatilla reservation, in the State of Oregon."

It related to the residence of the bands as bands and not as individual Indians, many of whom were residing off the particular reservation and yet within the country theretofore ceded to the United States by the treaty of 1855. Under the act mentioned a commission was appointed by the President, the members of which were to go upon the reservation and

ascertain as near as might be the number of Indians who would remain on that reservation and who should be entitled to take lands in severalty thereon, and the amount of land required to make the allotment, and the commission was then to determine and set apart so much of their reservation as should be necessary to supply agricultural lands for allotments in severalty. The commission was to report to the Secretary of the Interior the number and classes of persons entitled to allotment as near as they might be able to do so, and if the report were approved by the Secretary of the Interior the tracts selected should thereafter constitute the reservations for those Indians, and within which the allotments provided for in the act should be made.

Under this act a report had been made to the Secretary of the Interior by the commission some time after the conclusion of their labors in the Indian countries in 1891, and an opinion was asked by the Department of the Interior from the Assistant Attorney General regarding the rights of the appellee, among others, to an allotment under that act which had been refused by the commission. An opinion was delivered on July 1, 1893, by one of the Assistant Attorneys General, in which he held that the appellee was not entitled to an allotment, but upon reviewing that opinion, on June 28, 1895, he held that she was entitled thereto. In his latter opinion he thought that while it was agreed in the treaty of 1855, already mentioned in the statement of facts, that the Indians should remove within one year to the permanent reservation (which in this case was the Umatilla reservation), yet there was no penalty affixed to its violation, and the failure of the Indians to so remove and reside would not work a forfeiture of their tribal rights, and that while the appellee was not residing upon this reservation at the time that the act of 1885 became operative, she was, so far as that fact was concerned, in the same position as a majority of the Indians belonging to the confederated tribes mentioned in the act; that the record showed that when the agents of the Government went on this reservation they found but few Indians actually residing there, and it was only after weeks of sending out runners and using all the means at their disposal that the commissioners succeeded in securing the attendance of a majority of the male adults of these tribes. The Assistant Attorney General gave the opinion that that was itself a recognition by the department that residence upon the reservation was not essential to tribal recognition.

It is plain that the agreement in the treaty of 1855, by which the tribes and bands agreed to remove to and settle upon the reservation within one year after the ratification of this treaty, had not been lived up to so far as actual residence upon the reservation of individual Indians was concerned. Thirty years after that time, when the act of 1885 was passed, it is seen that a majority of the Indians were not even then actually residing, in the

strict sense of the term, upon this reservation. There existed under the treaty an exclusive right among the Indians of taking fish from the streams running through and bordering upon the reservation, and at all other usual and accustomed stations, in common with the citizens of the United States, and the privilege of erecting suitable buildings for curing such fish, and also the right of pasturing their stock on unclaimed lands in common with the citizens of the United States was secured to them. The right to roam over so much of the territory as was ceded by them to the Government as they had been accustomed to do and such as were not settled upon or claimed for individual use by citizens of the United States seems to have been recognized, or to have been expected by the Government, although the residence of the tribe or band as such was to be within the reservation mentioned in the treaty. It was also said in the opinion regarding the facts in this case:

"The trouble with these claimants seems to have arisen out of their failure to be upon the reservation when the census roll of the tribe was made up. They arrived at said reservation in reply to the communication sent to them by one of the Indians the day after the census takers had left the reservation, to wit, on the 7th day of June, 1887, or rather Mrs. Morisette arrived upon that day and Mrs. Smith shortly afterwards. They were recognized by Homily, chief of the Walla Wallas, and various other head men and members of the confederated tribes, and the Indian agent then in charge assigned each one of them to a parcel of land, after selection, and they have made valuable improvements on and have continued to reside thereon, as far as this record shows, ever since, the value of their improvements, amounting to a considerable sum. They began residence upon the land about the middle of June, and their reasons for not having arrived sooner that they lived some two hundred miles away and were without money to make the trip."

Pursuant to this opinion of the Assistant Attorney General, the Department of the Interior reconsidered its former decision, and held that the appellee was entitled to an allotment under the act of 1885. We concur with the latter opinion of the Assistant Attorney General, and hold that it was not necessary that the individual Indian of the tribes mentioned in the act of 1885 should be actually residing on the reservation at the time of the passage of that act. If the individual were a member of the tribe or band, recognized as such by his chiefs, it was not necessary that such person should be an actual resident of the reservation when the act was passed. The fact found is that the appellee herein is a full-blooded Indian woman, and was at all the times mentioned a member of the Walla Walla band or tribe of Indians, and at the time of the original allotment resided upon the reservation in the State of Oregon. When such a large percentage of allottees upon this reservation resided as did the appellee, elsewhere than actually upon the reservation at the date of the passage of the act of 1885, it cannot be that the act passed was intended to limit the right

to an allotment to those actually residing on the reservation to the exclusion of a majority of the members of the different bands or tribes. The fact of such non-residence is presumed to have been known by Congress, and the act should be construed with reference to that knowledge.

The purpose of the treaty and of the act evidently was to induce the Indians and encourage them so far as possible to break up the tribal relations and adopt the habits of an agricultural people, and it would seem that those persons who were Indians and members of one or the other bands or tribes of Indians mentioned in the treaty and in the act and recognized by the chief of the tribe, should have the right to an allotment, especially if recognized by the Land Department as entitled thereto.

The purpose of the act would fall very far short of accomplishment were the allotments confined exclusively to those actually residing within the limits of the reservation, while those who were absent therefrom, but still within the old limits of the land, and were members of the band, recognized as such, should be held not entitled to the allotments under the act, simply because of residence outside of the described limits of the reservation.

The appellant further contends that the weight of the evidence shows the appellee is not a member of the Walla Walla tribe of Indians. We are not disposed to review that question of fact, which has been determined by the special examiner and adopted by the Circuit Court and the Circuit Court of Appeals. There is evidence upon which the fact as found may be based, and it is not so plainly erroneous as to call upon this court to vary from its usual rule not to review the unanimous finding upon questions of fact of two courts, unless such finding is plainly erroneous. (*Stuart* v. *Hayden*, 169 U. S. 1, 14; *Baker* v. *Cummings*, Id. 189, 198; *The Carib Prince*, 170 Id. 655; *Towson* v. *Moore*, 173 Id. 17; *Smith* v. *Burnett*, Id. 430, 436; *Brainard* v. *Buck*, 184 Id. 99.)

Another objection is made that the United States is a necessary party defendant, and, not being before the court, no binding decree can be entered herein.

The contest here is between two Indians, each claiming the same land under an allotment which was made last to the appellant herein. The United States has no interest in the result. Both parties are Indians claiming under the act of 1885.

In our opinion the claim that the United States must be made a party is without foundation. Under the act of 1894 (*supra*) the Circuit Courts are given jurisdiction to try and determine any action of this nature, involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any law or treaty, "and the judgment or decree of any such court in favor of any claimant to an allotment of land shall have the same effect, when properly certified to the Secretary of

the Interior, as if such allotment had been allowed and approved by him. . . . *Provided*, That the right of appeal shall be allowed to either party as in other cases." The case at bar was commenced prior to the amendment of the statute of 1894 by the act of February 6, 1901 (31 Stat. 760), wherein it is provided that the United States shall be a party defendant, and the case must be decided without regard to the amendment.

Under this statute there is no provision rendering it necessary, in a private litigation between two claimants for an allotment, to make the United States a party. The statute itself provides that the judgment or decree of the court, upon being properly certified to the Secretary of the Interior, is to have the same effect as if the allotment had been allowed and approved by the Secretary. This provision assumes that an action may be maintained without the Government being made a party, and provides for the filing of a certificate of the judgment and its effect, and the Government thereby in substance and effect consents to be bound by the judgment and to issue a patent in accordance therewith. The first section of the act of 1885 (*supra*) provides that an allotment made by or under the direction of the Secretary of the Interior entitles the allottee to a patent for the land allotted to him. And the filing of the certificate of the judgment decreeing an allotment is to have the same effect with the Secretary as if the allotment had been made by him. This is sufficient.

Upon the facts herein found we are also of opinion that the appellee selected the lands in controversy within the meaning of the statute long prior to the selection made by the appellant, and that she is not concluded by the selection she afterwards made of another tract of land. The act of 1885 provided that the selection of land for allotment should be made by heads of families. The appellee was such and was so recognized by the Land Department. By section 6 of the act the Secretary of the Interior had power to determine all disputes between Indians respecting the allotments. If more than one person claimed the same land, it is, as we think clear, that the dispute should be decided and the allotment made in favor of the one whose priority of selection and residence and whose improvements on the land equitably entitled such person to the land. The Government has proceeded upon such principle heretofore, (*Shepley* v. *Cowan*, 91 U. S. 330,) and it is a right and eminently just principle. The defendant knew of the prior possession of the appellee, at the time he made his selection, and knew of her improvements upon the land, for they were open and visible, while he had made none, and had obtained possession by direction of the Land Office, only because of the mistake in law which denied the right of allotment to appellee on account of her absence when the census was taken. Defendant with all this knowledge selected the land and never offered to pay a dollar for the improvements and never has paid anything

therefor, nor does he allege in his answer, and there is no proof that he has since made any improvements on the land or expended anything thereon. When the Land Department corrected its mistake of law the appellee had the right to insist upon her original selection. Her selection of other land, after the department had reconsidered her case, does not prevent her from claiming this land from defendant. She selected the other land only after advising with the Indian officer and upon his statement that it would not affect her claim for the land she had previously selected and from which she had been ordered by the officers of the Government. She has never received any patent from the Government for this other land, and nothing further need be done by her in order to authorize the Government to cancel the allotment for this other land at the time when patent issues for the original selection.

We find no error in the judgment, and it is *Affirmed.*

True copy.

Test:

Clerk Supreme Court, U. S.